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Rights, Security and Conflicting International Obligations: Exploring Inter-Jurisdictional Judicial Dialogues in Europe

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Abstract

The European Court of Justice's decision in *Kadi & Al Barakaat* has frequently been condemned as a missed opportunity for the Court to engage in a wider international debate about how states' multiple layers of obligation relate to one another. In this paper, we compare the ECJ's approach in this case to previous approaches in the Council of Europe, the United Kingdom, France, Germany, and the EU courts themselves. We argue that the way in which the Court chose to frame the issues in *Kadi* in fact enabled it to engage in an inter-institutional and inter-organizational international dialogue rejecting dichotomous approaches to security and rights. At the same time, the approach enabled the Court to strengthen its internal constitutional commitment to fundamental rights protection and, *a priori*, to reject dichotomous counter-terrorist approaches on the local as well as the international level. We therefore present *Kadi* as a case of key significance for both European and international constitutionalist processes.

I. Introduction

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In its *Kadi and Al Barakaat* (hereinafter *Kadi*) judgment,¹ the European Court of Justice (ECJ) gave its clearest picture to date of the balance struck within the European Union (EU) legal order between the competing principles of primacy of international law and protection of fundamental rights. The conflict in this case played itself out within the broader patterns of contestation and counter-contestation between perceived security needs and counter-terrorism on the one hand and perceived human rights requirements on the other.

The judgment concerned an appeal from a decision of the Court of First Instance (CFI) which had rejected the applicants' actions to annul Council Regulation 881/2002 (the 'contested Regulation') insofar as it related to them.² The contested Regulation was the latest in a string of previous Regulations passed at the EU level implementing UN Security Council (SC) Resolutions 1267 (1999) and 1333 (2000), essentially requiring UN member states to freeze without delay funds controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the UN Al-Qaida³ and Taliban Sanctions Committee. The contested Regulation, which was adopted on the basis of Articles 60, 301 and 308 EC Treaty, provided in Article 2:

1. All funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I shall be frozen.

1 *Kadi*, appealed from Case T-306/01 *Yusuf and Al Barakaat* [2005] ECR II-3533 and Case T-315/01 *Kadi* [2005] ECR II-3649.

2 The applicants had originally sought annulment of Regulation 2062/2001 OJ 2001 L 277/25 and Regulation 2199/2001 OJ 2001 L 295/16 insofar as these measures concerned them; the CFI held as a preliminary matter in its judgment that the sole object of the actions should be considered to be a claim for annulment of the contested Regulation insofar as it concerned them.

3 In the literature this organization is referred to variously as Al Qaida, Al Qaeda and Al Q'aida. In this article we use the term Al Qaida as does the Sanctions Committee itself.

2. No funds shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I.

3. No economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I, so as to enable that person, group or entity to obtain funds, goods or services.

As the Sanctions Committee had, in late 2001, placed the applicants on its consolidated list, their names appeared in Annex I of the contested Regulation and their assets were frozen accordingly. Pursuant to SC Resolution 1452 (2002) certain derogations from the obligations to freeze funds could be permitted by member states on humanitarian grounds, subject to the consent of the Sanctions Committee. This Resolution was, in turn, implemented at the EU level by a Common Position and Regulation.⁴

The CFI dismissed the applicants' case, on grounds discussed in Part IV below. On appeal, the applicants' arguments were essentially that (1) the contested Regulation lacked a valid legal basis in the EC Treaty; (2) the CFI had breached international law in its ruling; and (3) the contested Regulation violated their fundamental rights. In its judgment, the ECJ controversially focused exclusively on the EU legal order and held that no measures could be introduced, including measures implementing mandatory SC Chapter VII Resolutions, which conflicted with the fundamental rights protected within the EU. The ECJ's decision in this case has been described as dualist,

⁴ Common Position 2003/140/CFSP OJ 2003 L 53/62; Regulation 561/2003 OJ 2003 L 82/1.

isolationist, and calling into question the extent to which the EU “cares” about international law. Such analyses, we argue, fail to properly grasp the extent to which *Kadi* represents an attempt by the ECJ to engage in an international dialogue between institutions (ECJ and SC) and organizations (UN and EU) as well as the ECJ’s commitment to furthering the process of internal constitutionalization of the European legal order. This dual constitutionalist message becomes evident when one contrasts the ECJ’s framing of the question before it with the manner in which analogous questions have been framed and decided in other European courts. In that context, this Article examines the pre-*Kadi* approaches of the CFI and ECJ, the European Court of Human Rights (ECtHR), and the superior courts of three European states—the United Kingdom, France, and Germany—for the purposes of illustrating the influence that strategic framing decisions can have on the outcome of legal disputes and, by implication, on the messages of constitutional commitment to fundamental rights communicated by such decisions.

This Article proceeds in five parts. Part II sets out the normative background of *Kadi* in terms of the conflicting obligations at stake for EU member states in that case, i.e., obligations flowing from Chapter VII SC Resolutions, on the one hand, and human rights obligations flowing from EU, ECHR and UN law, on the other. In Part III, we analyze a range of efforts from the bench to reconcile these conflicts prior to *Kadi*, examining the approaches of the EU courts, the ECtHR and the superior courts of three EU member states—before going on to consider the ECJ’s reasoning in *Kadi*. In Part IV, we consider *Kadi*’s significance both internally, i.e., for the EU legal order, and externally, i.e., for the international legal order. Part V provides a conclusion.

II. The Background of *Kadi*: Conflicting Obligations

The dispute in *Kadi* was a microcosm of the broader questions faced by states as counter-terrorism becomes increasingly internationalized and led by the SC by means of its Chapter VII measures.⁵ First is the decades-old question of the relationship between security and fundamental rights that states have grappled with at the domestic level. In situations of terrorist threat it is not uncommon for a dangerous dichotomy to be constructed between the protection of the state on the one hand (security) and the protection of individual liberties on the other (rights).⁶ The migration of counter-terrorism from the state to the international community, especially in the aftermath of the attacks of September 11, 2001, has seen the replication of this dichotomous construct particularly at the SC level. Second, states increasingly find themselves operating within a matrix of different legal regimes whose relationships to one another may not always be entirely clear. In any given situation, a European state may easily find itself having to negotiate a path between obligations at the international (UN), regional (EU, EC and Council of Europe) and domestic (constitutional and legislative) levels. At times—such as in relation to the SC’s asset freezing regime—these obligations may appear to conflict with one another and to be irreconcilable.

A. Security Obligations

1. SC Chapter VII Resolutions

Although a systematic treatment of terrorism has traditionally been difficult for international institutions, the SC had occasionally addressed individual incidents of terrorism through various Resolutions. In addition, a dozen international conventions had been adopted dealing with discrete elements of terrorism even before the attacks

⁵ See generally ERICA DE WET, *THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL* (2004).

⁶ See, for example, LAURA DONOHUE, *THE COST OF COUNTER-TERRORISM: POWER, POLITICS AND LIBERTY* (2008).

of September 11, 2001.⁷ Terrorism certainly comes within the remit of the SC given terrorists' capacity to seriously threaten international peace and security and the Council's mandate to protect these values. Indeed, it was under this Chapter VII mandate that the SC introduced Resolution 1267 in 1999 against the Taliban. This Resolution forms the cornerstone of the modern, post-9/11, counter-terrorist asset-freezing regime that is the focus of this article.

On September 12, 2001, the SC passed Resolution 1368 declaring its intention to combat international terrorism "by all means".⁸ One of the most fundamental ways of trying to disrupt terrorist activity is by the disruption of financing.⁹ The SC approached this task in two ways. First it introduced Resolution 1373, imposing a general obligation on all states to "prevent and suppress the financing of terrorist acts" and establishing the UN Counter-Terrorist Committee¹⁰ to administer and support the scheme. Second, the SC expanded the pre-existing asset-freezing regime under Resolution 1267. It is the European implementation of the 1267 regime—by which decisions regarding listing delisting and humanitarian exemptions are made at the UN level—that was at issue in *Kadi*.

The Al Qaida and Taliban Sanctions Committee (the 'Sanctions Committee'),

7 UN Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963); UN Convention on the Suppression of Unlawful Seizure of Aircraft (1970); UN Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971); UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (1973); UN International Convention on the Physical Protection of Nuclear Material (1980); UN Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988); UN Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988); UN Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988); UN Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991); International Convention for the Suppression of Terrorist Bombings (1997); International Convention for the Suppression of the Financing of Terrorism (1999).

8 Preamble to SC Resolution 1368 (2001).

9 For a concise summary of how international terrorist organizations construct their finances see, e.g., JIMMY GURULÉ, *UNFUNDING TERROR: THE LEGAL RESPONSE TO THE FINANCING OF GLOBAL TERRORISM* (2008), 21-51.

10 *Id.*, Operative Paragraph 6.

established under Resolution 1267 in 1999,¹¹ now has an expanded remit to identify individuals and organizations whose finances are to be frozen or disrupted as a result of terrorist activity. The Sanctions Committee maintains a list of individuals and entities with respect to Al-Qaida, Osama bin Laden, the Taliban, and other individuals, groups, undertakings and entities associated with them. This list—known as the Consolidated List—is the basis for the freezing of assets and disruption of finances by domestic financial services bodies under the 1267 regime. The Consolidated List can include listings not only of those said to be involved in or members of the Taliban and Al Qaida, but also those who are said to be “associated with” Osama Bin Laden, Al Qaida, the Taliban “or any cell, affiliate, splinter group or derivative thereof.”¹² The concept of ‘association’ is broadly defined.¹³ In addition, any individual, entity, group or undertaking that “otherwise support[s] acts or activities” of Al Qaida, Osama Bin Laden, the Taliban “or any cell, affiliate, splinter group or derivative thereof” might be put on the Consolidated List.

The first step in the listing process is the identification at the national level of candidates for listing. Thus the initial analysis of whether a person or entity fulfils the requirements for inclusion takes place on the domestic politico-legal level, although given the fact that the individual might live in a state of which is he or she is not a citizen there will often be a transnational element to it. The proposing state is required to compile the evidence gathered against the person proposed for listing and present that evidence, together with an appropriately completed standard form, to the Sanctions Committee which subsequently makes a decision as to a listing based on this evidence. All of the Sanctions Committee’s meetings take place as closed

11 SC Resolution 1267 (1999), Operative Paragraph 6.

12 Operative Paragraph 2, Resolution 1822 (2008).

13 *Id.*

sessions unless the Committee itself decides to hold an open session at any given time.¹⁴ The listing process within the Sanctions Committee is non-adversarial and the person being proposed for listing does not have any opportunity to make out a case. Thus, the consequences of inclusion on the Consolidated List are placed on listed persons without meaningful, rights-protecting, international processes.

All those included on the Consolidated List can make a petition for review. This petition will be made either directly to one's state of residence or nationality or to the 'Focal Point', i.e., a centralized point from which the communication with the initiating state is conducted. Notably, the Focal Point was introduced in 2006 and did not, therefore, exist at the time that Kadi was included in the Consolidated List. States may use their discretion to allow humanitarian exemptions from the asset freeze that accompanies inclusion in the Consolidated List.¹⁵ This is subject to the exempting state notifying the Sanctions Committee of its intention to release these funds and the Sanctions Committee not taking a negative decision on the relevant state's intention within three days of receiving this notification. The international system does not dictate how the exempting state's decision to allow access to these funds and assets ought to be taken.

2. Implementation of Chapter VII Resolution obligations by the EU

Although neither the EC¹⁶ nor the EU¹⁷ is a signatory to the UN Charter, all 27 EU

¹⁴ CTC Guidelines of the Committee for the Conduct of Its Work (December 9, 2008 version), paragraph 2(a).

¹⁵ Under Operative Paragraph 1(a) of Resolution 1452 (2002), assets and funds that are "necessary for basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges for routine holding or maintenance of frozen funds or other financial assets or economic resources" can be made available to the listed individual or entity.

¹⁶ Article 3 and 4, UN Charter provide that only states may be members of the United Nations.

¹⁷ The EU does not currently have the legal capacity to sign up to international agreements, although if ratified the Treaty of Lisbon will amend this—Treaty of Lisbon OJ 2008 C 115/1 (Art. 47 TEU).

member states are members of the UN, with France and the United Kingdom holding permanent seats on the SC. Thus, all member states are bound by mandatory Chapter VII Resolutions of the SC. Member states have in many instances chosen to implement UN Resolutions, especially those creating economic sanctions, by means of EU measures. This choice is generally motivated by reasons of efficiency and politics, as well as the wish to avoid unilateral measures which could compromise the EU common market¹⁸ given that, as a legal matter, member states are free to implement UN Resolutions unilaterally.¹⁹ In the case of UN economic sanctions, member states have typically used a combination of EU implementing measures, due to the EU's particular constitutional set-up.

A first layer of implementation comprises measures passed under the EU's common foreign and security policy (CFSP).²⁰ The standard CFSP measure used to implement UN economic sanctions is the common position, the aim of which is to "define the approach of the Union to a particular matter".²¹ The EU Treaty obliges member states to "ensure that their national policies conform to the common positions",²² although they do not have direct effect²³ and the Community courts currently have no

18 This rationale is normally specified in the preamble to the implementing EC legislation. See, in the case of the contested Regulation in Kadi, for instance, preamble, recital 3.

19 However, even when implemented by means of EU measures, member states remain responsible for the consequences of implementing UN Resolutions. Thus, the ECJ has held that the damage resulting from economic sanctions imposed by a UN Resolution cannot be attributed to the EC: Case T-194/95 Dorsch Consult [1998] ECR II-667.

20 Also known as the second pillar of EU law, under the traditional image of the EU's constitutional structure as comprising three pillars (set up originally by the Treaty of Maastricht OJ 1992 C 191/1, and amended by a variety of subsequent Treaties), with the first pillar being the EC, the second pillar being the CFSP and the third pillar Police and Judicial Cooperation in Criminal Matters (previously termed Justice and Home Affairs). While integration in the first pillar displays many supranational characteristics (e.g. more powers granted to supranational institutions, such as the Commission and the European Parliament; widespread qualified majority voting in the Council; compulsory jurisdiction of the Community courts), integration in the second and third pillars remains mainly intergovernmental (e.g. fewer powers for the Commission and European Parliament; unanimity of voting in the Council; no compulsory jurisdiction of the Community courts). On the demarcation between EC measures and CFSP measures, see Case C-91/05 Commission v Council (Small Arms and Light Weapons) [2008] ECR I-3651.

21 Article 15 EU.

22 *Id.*

23 By direct effect is meant the right of individuals to rely on provision of the EEC Treaty before their

jurisdiction over CFSP.²⁴

A second layer of EU implementation of UN economic sanctions comprises European Community (EC) law measures. These are used where the implementing measures further one of the aims of the EC, as set out in the EC Treaty. In particular, as one of the EC's main goals remains achieving the common market,²⁵ EC measures are used where it is felt that unilateral measures may cause distortions of competition harmful to the common market. In addition, the legal effects of EC measures are quite different from those of CFSP measures, reflecting the more supranational nature of the EC. EC Regulations ('Regulations') are used to implement UN economic sanctions. Regulations have the distinctive quality of being directly applicable in the legal orders of each member state (i.e., no transposing legislation is required),²⁶ and can in themselves give rights to and impose obligations on individuals.

As the EC's powers are confined to those which have been conferred on it by its member states, each Regulation must specify the EC Treaty provision(s) on which it is based (the 'legal basis' of the legislation). Regulations implementing UN economic sanctions freezing the assets of natural and legal persons (so-called 'smart sanctions') have thus far tended to be based on a combination of Articles 60, 301 and 308 EC. Articles 60 and 301 EC, read together, enable the Council to take urgent action, by qualified majority voting, on the movement of capital and payments where this is

national courts, even without a layer of domestic implementing law (as long as the relevant Community norm was justiciable, i.e. clear and sufficiently precise). This right was subsequently extended to binding secondary Community legislation (although, in the case of Directives, only in actions against the State): see, for instance, Case C-152/84 Marshall [1986] ECR 723.

24 The Treaty of Lisbon would extend its jurisdiction to include ensuring that the Union's general competences did not affect the CFSP and vice versa, as well as review of "the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council" (Article 275 TFEU). It would also get rid of the formal three pillar structure, merging them all into a unified structure (the EU) and abolishing the EC as a separate entity.

25 Article 2 EC. The goal of achieving the common market has, since the 1957 Treaty of Rome, been supplemented in subsequent Treaty revisions to include flanking aims such as social and environmental protection.

26 Article 249 EC.

deemed necessary to implement a CFSP common position or joint action requiring economic relations with one or more third countries to be interrupted or suspended. Due to doubts (particularly on the Council's behalf)²⁷ as to whether individuals could properly be included within the scope of Article 301 EC, Article 308 EC was added as a third legal basis for 'smart' sanctions. This article, commonly known as the 'flexibility clause', allows for action by the Community, subject to a unanimous vote in the Council and consultation of the European Parliament, where such action is "necessary to attain, in the course of the operation of the common market, one of the objectives of the Community" and where no legal basis otherwise exists in the EC Treaty.

Although the EU is not a member of the UN, the decision to fulfil member states' Chapter VII obligations by means of EU measures results in a need to ensure not only that the state-level domestic processes are rigorous and rights-based but also that the internal processes of the EU adhere to the fundamental principles of individual rights. This is important not only in order to ensure compliance with the EU's own internal human rights framework, but also to aid member states of the EU in complying with all of their levels of asset-freezing obligations (UN, EU and domestic) *and* their human rights obligations at the domestic, EU and international levels.

3. Effect of UN obligations within the EU legal order

In order to understand the effects of UN obligations within the EU legal order, we must untangle the multiple and complex ways in which international law and international agreements can take effect within it.

First, where the EC signs up to an international agreement the EC Treaty provides that

²⁷ See Jean-Paul Jacqué, *Case Note on Kadi*, 45 RTD EUR, janv-mars (2009), 163.

it becomes binding on the EC institutions and on member states (i.e., *pacta sunt servanda*),²⁸ forming part of the EC legal order from the date when it enters into force.²⁹ As the EC is not itself a signatory to the UN Charter, UN obligations probably cannot take effect in EC law in this manner, although the ECJ in *Kadi* declined to come to an absolute conclusion on this point.³⁰

Second, where an international agreement has been concluded not by the EC itself but by each of its member states, the agreement (and decisions taken by institutions set up under it)³¹ will still have binding force within the EC legal order if the EC has taken over the powers previously exercised by its member states in the field covered by the agreement.³² In the case of the UN Charter, the EC has not generally taken over such powers; rather, competence in the fields covered by the Charter has either largely remained with the member states (e.g., security and defence) or is at most shared by the EU and its member states (e.g., promoting respect for fundamental rights).³³

Third, an international agreement (and decisions taken by institutions set up under it) will still have binding force where the EC is not a signatory if the EC Treaty expressly provides that the EC must exercise its powers in accordance with the agreement.³⁴ No such express provision exists in the case of the UN Charter.³⁵

28 Article 300(7) EC.

29 Case 181/73 Haegeman [1974] ECR 449, para 5, Case 104/81 Kupferberg [1982] ECR 3641.

30 *Kadi*, para 307 (“supposing [Article 300(7)] to be applicable to the Charter of the United Nations”).

31 See Opinion 1/91 [1991] ECR I-6079.

32 Classic examples of this are agreements concluded in the field of international trade such as the GATT, where the EC Treaty conferred the powers covered by the GATT agreement on the EC. As a result, the ECJ has held that the GATT (and its successor, the WTO agreement) have binding force as a matter of EC law (Joined Cases 21-24/72 *International Fruit Company* [1972] ECR 1219).

33 See further, Martin Nettesheim, *U.N. Sanctions against Individuals – A Challenge to the Architecture of European Union Governance* 44 *COMMON MARKET LAW REVIEW* 567 (2007).

34 Although rare, examples of this include the Geneva Convention of 1951 and the Protocol of 1967 relating to the status of refugees (Article 63(1) EC).

35 The Treaty of Lisbon, when and if it enters into force, would include “respect for the principles of the United Nations Charter and international law” among the objectives of the EU’s external action (Article 3 TEU).

Fourth, the ECJ has held that the EC must respect international law generally in the exercise of its powers.³⁶ Thus, the ECJ takes customary international law and general principles of international law into account in interpreting and applying EC law.³⁷ In particular, where the EC has given undertakings in the context of the UN and other international organizations, its powers must be exercised in observance of these undertakings.³⁸ Where EC legislation is passed to implement a SC Resolution, the wording and purpose of such Resolution must be taken into account in interpreting the implementing legislation.³⁹

A similar wish to respect international law is evident from Article 307 EC, which provides that rights and obligations arising from international agreements concluded with third countries by one or more member states before the EC Treaty entered into force or before their accession “shall not be affected by the provisions of this Treaty”.⁴⁰ The outcome is that, should a conflict arise between a provision of EC law and an obligation flowing from such a prior agreement, the obliged member state must comply with the international obligation⁴¹ and the EC must not impede such compliance.⁴² However, this Article goes on to specify that, to the extent that such agreements are not compatible with the EC Treaty, the member state(s) concerned shall “take all appropriate steps to eliminate the incompatibilities established”.⁴³

Article 307 clearly applies to member states’ obligations flowing from the UN Charter, as all member states joined the UN prior to becoming members of the EU. It

36 Case C-286/90 Poulsen and Diva [1992] ECR I-6019. The ECJ has taken account of ICJ judgments in interpreting EC law. See, for instance, Case C-162/96 Racke [1998] ECR I-3655.

37 Examples include the territoriality principle as a limit to the scope of the EC’s jurisdiction (see, for instance, Case T-102/96 Gencor [1999] ECR II-753) and the law of treaties codified in the Vienna Convention of 1969 (for instance, Case T-115/94 Opel Austria [1997] ECR II-39).

38 See, in the context of the EC’s cooperation and development policy, Case C-91/05 Commission v Council (Small Arms and Light Weapons) [2008] ECR I-3651 and see Kadi, paras 292-293.

39 Case C-117/06 Möllendorf and Möllendorf-Niehuus [2007] ECR I-8361.

40 Article 307(1) EC.

41 Case 158/91 Levy [1993] ECR I-4287.

42 Case 812/79 Burgoa [1980] ECR 2787.

43 Article 307(2) EC.

follows that the EC must not impede member states from complying with their UN obligations.⁴⁴ Nonetheless, as we discuss below, the ECJ held in *Kadi* that Article 307 EC does not permit any challenge to the principle of protection of fundamental rights within the EC legal order.⁴⁵

Finally, and in any event, Article 297 EC allows the member states, after prior consultation, jointly to act in situations where a member state is called upon to take measures in order “to carry out obligations it has accepted for the purpose of maintaining peace and international security.”

In sum, it is evident from the above that, even before *Kadi*, the question of the effect of international law--and in particular UN obligations--within the EU legal order was a complex one. In this regard *Kadi* offers welcome clarification, quite apart from what one may think of the substance of the judgment.

B. Human Rights Obligations

All EU member states are constrained in their actions by a multi-layered system of rights-protection that includes UN human rights treaties to which they are a party, the Council of Europe’s ECHR, fundamental rights under EU law, customary international law including *jus cogens* and their own domestic rights-protection provisions including constitutional standards. In implementing the SC’s asset-freezing regime these states operate under a general duty to comply with their human rights obligations under international law. This duty arises not only out of their ratification of various human rights treaties but also, since 2003, by virtue of an express direction of the SC itself. In Resolution 1456 (2003), the SC provided:

44 Case C-177/95 *Ebony Maritime* [1997] ECR I-1111. See also, Case C-84/95 *Bosphorus* [1996] ECR I-3953, discussed below.

45 *Kadi*, para 304.

States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.⁴⁶

In relation to treaty-based obligations under the ECHR and the International Covenant on Civil and Political Rights (ICCPR), states have the option to enter a derogation to certain protected rights in times of war or public emergency threatening the life of the nation.⁴⁷ Derogations permit of the suspension of the full extent of certain treaty provisions' operations and ought only to be entered in limited circumstances and be as limited (temporally, geographically and substantively) as possible under the circumstances.⁴⁸ No European member states entered any derogations for the purpose of implementing the sanctions regime mandated by the SC. As a result, all of these states remain bound by their human rights obligations under these treaties, taking into account the well-established degrees of flexibility that international institutions tend to afford to states in counter-terrorism and other security operations,⁴⁹ unless it can be shown that the obligation to freeze individuals' assets flowing from the SC somehow overrides or at least qualifies these treaty-based obligations.

The EU itself is also bound by certain human rights standards. By Article 6(1) EU, the EU is founded on the principles of "liberty, democracy, respect for human rights and

46 SC 1456 (2003), Operative Paragraph 6.

47 Article 15, European Convention on Human Rights; Article 4, International Covenant on Civil and Political Rights.

48 See Human Rights Committee, General Comment No. 29 U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) on the ICCPR derogations regime and Aly Mokhtar, *Human Rights Obligations v Derogations: Article 15 of the European Convention on Human Rights* 8 INTERNATIONAL JOURNAL OF HUMAN RIGHTS 65 (2004).

49 Fiona de Londras, *The Right to Challenge the Lawfulness of Detention: An International Perspective on US Detention of Suspected Terrorists* 12 JOURNAL OF CONFLICT AND SECURITY LAW 223 (2007), 247-255.

fundamental freedoms, and the rule of law, principles which are common to the Member States.” Article 6(2) EU offers further clarification that the EU “shall respect fundamental rights” as guaranteed by the ECHR “and as they result from the constitutional traditions common to the Member States, as general principles of Community law.” As is well known, the latter provision codifies the consistent case law of the ECJ since the 1970s⁵⁰ identifying respect for fundamental rights as one of the general principles of EC law inherent in the founding Treaties, despite the fact that no reference was made to such respect in these Treaties.⁵¹ In terms of their legal status, general principles of Community law rank at the same level as the EC and EU Treaties themselves (i.e., as primary EU law). This means that they can function as grounds of invalidity of binding acts passed by EC institutions, including all secondary EC legislation, and that courts applying EC law must interpret it as far as possible in conformity with such principles.⁵²

Notwithstanding the general obligation to comply with international human rights law outlined in SC Resolution 1426, it is beyond dispute that the asset-freezing regime mandated by the SC poses at least *prima facie* challenges to states’ capacities to vindicate individual rights. These sanctions have implications for both civil and political rights *and* socio-economic rights. In relation to the latter the implications for individuals whose assets are frozen are immediately evident: the inability to deal with

50 See, for instance, Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125, Case 4/73 Nold v Commission [1974] ECR 491, Case C-36/02 Omega Spielhallen [2004] ECR I-9609, Case C-112/00 Schmidberger v Austria [2003] ECR I-5659.

51 This case law was, at least initially and in part, the ECJ’s response to the threat from certain national courts (particularly in Germany, as discussed below) to refuse recognition of the supremacy of EC law over national law in the absence of adequate guarantees that respect for fundamental rights was central to the Community legal order. See, for instance, (Germany) Internationale Handelsgesellschaft [1974] 2 CMLR 540 (“Solange I”), Re Wünsche Handelsgesellschaft [1987] 3 CMLR 225 (“Solange II”), Brunner v The European Union Treaty [1994] 1 CMLR 57 (“Maastricht”); (Italy) Frontini v Ministero dell Finanze [1974] 2 CMLR 372; (Poland) judgment of the Polish Constitutional Tribunal in Polish Membership of the European Union (Accession Treaty) K 18/04, May 11, 2005.

52 See, for instance, Case 4/73 Nold v Commission [1974] ECR 491, Case C-36/02 Omega Spielhallen [2004] ECR I-9609, Case C-112/00 Schmidberger v Austria [2003] ECR I-5659.

one's assets can seriously impair one's capacity to fully exercise the right to adequate shelter and housing,⁵³ the right of access to adequate health care⁵⁴ and education,⁵⁵ and the right of freedom from hunger.⁵⁶ In relation to civil and political rights the system whereby one is listed for targeting under the sanctions regime has the capacity to seriously undermine one's right to fair procedures and due process of law.⁵⁷ Listed individuals have been compelled to go to the courts in an attempt to have their rights vindicated and, in the course of so doing, have raised the question of how (or, indeed, whether) apparently conflicting international obligations towards security and rights can be reconciled through judicial interpretation and adjudication.

III. Efforts from the bench to reconcile these conflicts

This Part provides an overview of the efforts from the bench to reconcile the apparent conflicts that can arise between states' obligations under SC Resolutions on the one hand and under human rights law on the other. The first section deals with pre-*Kadi* jurisprudence in both the regional European courts and the domestic courts of the United Kingdom, Germany and France. The second section gives an account of the ECJ's decision in *Kadi* itself. This Part illustrates the different conclusions reached by the respective courts to broadly identical questions of norm conflict. It provides the substantive case studies for the argument, outlined in Part IV, as to the importance of the courts' framing decisions regarding the states' conflicting obligations in shaping and communicating the outcome of the dispute.

⁵³ Article 11(1), International Covenant on Economic, Social and Cultural Rights; Article 16, European Social Charter.

⁵⁴ Article 25(1), Universal Declaration of Human Rights; Article 12(1), International Covenant on Economic, Social and Cultural Rights.

⁵⁵ Article 26, Universal Declaration of Human Rights; Article 13(1), International Covenant on Economic, Social and Cultural Rights.

⁵⁶ Article 11(2), International Covenant on Economic, Social and Cultural Rights. For an overview of socio-economic rights see, for example, MALCOLM LANGFORD & AOIFE NOLAN, *LITIGATING ECONOMIC, SOCIAL AND CULTURAL RIGHTS: LEGAL PRACTITIONERS DOSSIER* (2006).

⁵⁷ Article 6, European Convention on Human Rights; Article 14, International Covenant on Civil and Political Rights.

A. EU courts pre-*Kadi*

Cases in which the EU courts have been faced with direct potential conflicts between EU human rights norms and EU measures implementing Chapter VII Resolutions are still relatively rare. The first real instance was in *Bosphorus*,⁵⁸ which concerned the economic embargo imposed by the UN SC on the Federal Republic of Yugoslavia in the early 1990s.⁵⁹ The SC Resolutions were implemented by means of Regulation 990/93.⁶⁰ Bosphorus, a Turkish airline, had leased two aircraft for four years from the Yugoslav national airline, JAT. Following maintenance work at Dublin airport on one of the aircraft, the Irish government directed that it should be impounded pursuant to Regulation 990/93 on the ground that a controlling interest in the aircraft was held by a person or undertaking in or operating from the Federal Republic of Yugoslavia. The Irish Supreme Court asked the ECJ whether this Regulation should be interpreted as applying to an aircraft in circumstances where the aircraft had been leased to a non-Yugoslav undertaking.

Following Advocate General Jacobs, the ECJ held that the Regulation did so apply, referring expressly to the SC Resolution by which the decisive factor was the aircraft's ownership rather than its day-to-day control.⁶¹ Importantly, although the ECJ rejected Bosphorus's arguments that the impounding breached its fundamental rights, it did not decline jurisdiction to consider such arguments. Rather, it expressly engaged in an analysis of the proportionality of the restriction, concluding that the

58 Case C-84/95 *Bosphorus* [1996] ECR I-3953. See Sionaidh Douglas-Scott, *Case Note on Bosphorus* 43 COMMON MARKET LAW REVIEW 243 (2006) (focusing on the subsequent judgment of the European Court of Human Rights arising out of the same facts).

59 Resolution 820 (1993), strengthening the embargo decided upon in Resolutions 713 (1991), 757 (1992) and 78 (1992).

60 OJ 1993 L 102/14.

61 *Bosphorus*, paras 14-17. The ECJ frequently refers to the aim of underlying UN SC Resolutions in cases of interpreting implementing Community legislation, including in non-human rights related cases. See, for instance, Case C-177/95 *Ebony Maritime* [1997] ECR I-1111, para 20; Case C-371/03 *Aulinger* [2006] ECR I-2207; Case C-117/06 *Möllendorf* [2007] ECR I-8361.

impounding was justified in view of the “objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina.”⁶² *Bosphorus* subsequently brought an unsuccessful action against Ireland before the ECtHR arising out of the same facts, discussed below.⁶³

Bosphorus can be distinguished from the (more numerous) instances in which the Community courts have dealt with potential conflicts between EU human rights norms and EU measures which, although broadly flowing from Chapter VII Resolutions, do not directly reproduce them (often termed ‘autonomous’ EU measures). As the actual content of the EU measure has been decided upon at the EU, rather than UN, level, such cases do not imply a direct challenge to the legality of the Chapter VII Resolution making rights-based assessments of these measures less controversial from a general international law perspective. Thus, a more intensive standard of review has been adopted by the EU courts in such cases. This occurred for the first time with the CFI’s 2006 judgment in *PMOI*, in which the court annulled a Council Decision freezing the financial assets of the People’s Mujahidin of Iran on the ground that it infringed the applicant’s procedural rights.⁶⁴ Although the Decision implemented SC Resolution 1373, the black list on which the applicant had appeared had been drawn up by the EU rather than at the UN level. Similarly, in *Sison*, the CFI held that a black-listing decision which involved the “exercise of the Community’s own powers, entailing a discretionary assessment by the Community” had to be compliant with Community fundamental rights standards.⁶⁵

62 *Bosphorus*, para 26.

63 (2006) 42 E.H.R.R. 1.

64 Case T-228/02 *PMOI* [2006] ECR II-4665. See also, the follow-up cases Case T-256/07 *PMOI* ECR [2009] II-0000 and Case T-284/08 *PMOI* [2008] ECR II-0000, discussed below.

65 Case T-47/03 *Sison* [2007] ECR II-73, para 154. In that case, observance of the right of defence

Prior to *Kadi* such a ‘rights-based’ approach appeared to reach its limits where the EU courts were asked to review CFSP measures for compliance with fundamental rights norms. In a line of cases beginning with *Segi*, it has been confirmed that, under the EU Treaty as it now stands, no jurisdiction exists to consider the compatibility of such measures with EU human rights norms.⁶⁶ Rather, the scope of judicial review extends only to the question whether the use of the CFSP measure respects the delimitation of competences between the EC and CFSP (i.e., whether an EC measure could and should have been used in place of a CFSP measure).⁶⁷ In *Segi*, for instance, the Grand Chamber of the ECJ was confronted with the question whether it could order compensation for damage caused by *Segi*’s inclusion on a list of persons, groups and entities involved in terrorist acts annexed to a common position implementing a Chapter VII Resolution, which had been adopted under the CFSP and the other area of intergovernmental EU cooperation, justice and home affairs (JHA).⁶⁸ In answering in the negative, the ECJ emphasized the limited nature of its jurisdiction to review CFSP and JHA measures under the current version of the EU Treaty.⁶⁹ Nonetheless, it

required that, “evidence adduced against the party concerned...should be notified to it, in so far as possible, either concomitantly with or as soon as possible after the adoption of an initial decision to freeze funds” (para 184). Although such a right had not been observed in that case, the conditions for award of damages against the Community were not made out. In *Ocalan*, the ECJ took an analogous approach, holding a challenge to an EC decision including the Kurdistan Workers’ Party (PKK) on the EU’s asset-freezing list to be admissible by interpreting its admissibility criteria in the light of the general principle of respect for fundamental rights. Case C-229/05 P *Ocalan* [2007] ECR I-439, paras 109-110, overturning the CFI’s Order in T-229/02 PKK and KNK v Council [2005] ECR II-539. See also, for instance, Case C-117/06 Möllendorf [2007] ECR I-8361, para 78 (member states bound, when implementing Community law transposing UN SC Resolutions, to do so as far as possible in conformity with the requirements flowing from the protection of fundamental rights within the Community legal order).

66 Case C-355/04 P *Segi* [2007] ECR I-1657, appealed from Case T-338/02 *Segi* [2004] ECR II-1647; Case T-228/02 PMOI; Case T-299/04 Selmani; Case C-354/04 P *Gestoras Pro Amnistía* [2007] ECR I-1579, appealed from Case T-333/02.

67 See Article 47 EU. Such Community vs EU legal basis disputes are increasingly common, due in particular to the continued differences in power enjoyed by the Commission, European Parliament, Council and member states in the Community pillar as compared to the EU pillars (see, for instance, Case C-91/05 *Commission v Council (Small Arms and Light Weapons)* [2008] ECR I-3651).

68 The common position at issue (2001/931) was adopted on the dual legal bases of Articles 15 and 34 EU. The provision challenged was that ordering member states to afford each other the “widest possible assistance” in preventing and combating terrorist acts, including with respect of enquiries and proceedings conducted by their authorities in relation to those mentioned on the list.

69 Although, as noted above, should the Treaty of Lisbon come into force, the Community courts’ jurisdiction would be extended to reviewing the legality of CFSP sanctions against natural and legal

broadened the scope of access to justice for JHA measures in holding that, where JHA common positions were intended to produce legal effects in relation to third parties, the right to effective judicial protection required that the ECJ have jurisdiction to review their legality and to accept preliminary references from national courts concerning such acts despite the fact that the EU Treaty does not expressly allow for this.⁷⁰

B. The European Court of Human Rights

Although it has not yet considered the relationship between methods of implementing the post-September 11th asset-freezing regime mandated by the SC and the requirements of the ECHR, the ECtHR has on two occasions handed down judgments on the relationship between SC Resolutions and the ECHR which are worthy of consideration.

The case of *Bosphorus Airways v Ireland*⁷¹ was decided by the Grand Chamber of the ECtHR following a lengthy series of litigation in Ireland and before the EU courts described above. The complainant in this case claimed that the Irish government's action in impounding the aircraft pursuant to EC Regulation 990/93 was a violation of the lessee's right to property and possessions provided for by Article 1 of Protocol 1 to the European Convention. At the heart of this case was the claim that the violation flowed from Ireland's cooperation within an international organization (the EU)

persons (Article 275 TFEU). See likewise, Case T-47/03 Sison [2007] ECR II-73. The presence of political declarations of the Council to the effect that the common position challenged respects individuals' fundamental rights and that "in the event of any error in respect of the persons, groups or entities referred to, the injured party shall have the right to seek judicial redress" does not, in the ECJ's view, change the limited scope of its jurisdiction to award damages for injury caused by common positions: see, for instance, Case C-354/04 P Gestoras Pro Amnistía [2007] ECR I-1579, paras 58-62. 70 Segi, paras 52-57. This is a classic example of the ECJ's practice of looking at the substance, rather than the form, of a measure in evaluating the extent of its jurisdiction: as, by the EU Treaty itself, common positions are not supposed to produce legal effects in relation to third parties, those which do so cannot, in the ECJ's view, amount to "true" common positions as such.

71 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland*, Application No. 45036/98, Judgment of 30 June 2005.

which did not provide sufficient means for the protection of human rights. The Grand Chamber rejected the claim and held that there is a presumption of compliance with a state's Convention obligations when it cooperates with an international organization, provided that "the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides".⁷² In this case the ECtHR held that the EU did provide protection equivalent to that of the Convention system, not only because of its recognition of individual rights but also because of these rights' effectiveness. In the ECtHR's view, mere provision for rights was not sufficient; rather the presumption of Convention-compliance could be rebutted if the mechanisms in place to ensure observance of those rights were deemed ineffective.⁷³

Although *Bosphorus* was a case about equivalent protection within the EU, the test laid down seems generalizable beyond the EU and thus applicable to other international organizations in which member states participate. On an initial viewing it appears unlikely that the asset freezing mechanisms at the UN level provide an equivalence of protection under this test; while the UN is committed to the protection, promotion and realization of human rights (as reflected in the Charter), the mechanisms in place for the protection of rights in the context of asset freezing are likely to be deemed ineffective. There are particularly grave concerns surrounding due process and a listed person's capacity to make an effective case for de-listing at the international level. However, the role of Article 103 of the Charter of the United Nations must not be neglected when considering the potential impact of *Bosphorus* on any case concerning UN-level asset freezing measures. Article 103 provides:

⁷² Application No. 45036/98, Judgment of 30 June 2005, para. 155.

⁷³ *Id.*, para. 160.

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Arguably, Article 103 could be read as identifying SC Resolutions as a special case of some kind so that even if the presumption of Convention compliance were rebutted by the lack of effective rights-protection mechanisms, the *source* of the international obligation might make noncompliance with the Convention permissible. These questions remained unanswered in *Bosphorus* but arose once more in the recent joined decisions of *Behrami v France* and *Saramati v France, Germany & Norway*.⁷⁴ In these cases the court was asked to consider whether state parties to the ECHR could be held liable under that Convention for actions done as part of the UNFOR and UMIK forces in Kosovo. In its admissibility decision, the Grand Chamber found that the acts of member states operating as part of these multi-national forces were in fact attributable to the UN and not to the individual states themselves. As a result, the court held that there was no state-based responsibility for these actions and no assessment of Convention-compliance could be undertaken—the court lacked jurisdiction *ratione personae*. While this part of the decision has been subject to concerted criticism by commentators,⁷⁵ it seems likely that the court framed the dispute in jurisdictional/attribution terms in order to ensure that it would not have to consider the impact of Article 103 of the UN Charter on states' Convention-based obligations.⁷⁶ Thus, although the respondent parties in these cases made express

74 Application Numbers 71412/01 and 78166/01, Grand Chamber Decision on Admissibility, 2 May 2007.

75 See especially Marko Milanovic & Tatjana Papic, *As Bad as it Gets: The European Court of Human Rights's Behrami and Saramati Decision and General International Law* 58(2) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 267 (2009).

76 *Id.*, 274.

arguments that, as a result of Article 103, Chapter VII SC Resolutions would displace or pre-empt European Convention obligations, the ECtHR did not proffer any conclusions on that matter. That notwithstanding, the court did include within its judgment a paragraph that suggests (albeit *obiter*) that attribution of action to the UN under Chapter VII SC Resolutions precludes any Convention-based review:

Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, *the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court..*⁷⁷

(emphasis added)

At first blush, *Behrami* appears to clash to some degree with the ECtHR's decision in *Bosphorus*. It is at least arguable, however, that these cases have different spheres of operation. *Bosphorus* quite clearly laid down the principle that the presumption of equivalent protection will apply only in cases where the state "does no more than implement legal obligations" assumed under another treaty and therefore does not have discretion⁷⁸ and the treaty and obligations emanate from an organization that provides equivalent protection for human rights as a general matter.⁷⁹ This presumption—that there is no conflict between the state's various obligations—can only be rebutted under the *Bosphorus* principle if there is a manifest deficiency in human rights protection in the circumstances of the particular case at hand.⁸⁰ Indeed,

⁷⁷ Above n. 71, para. 149.

⁷⁸ *Id.* para. 156.

⁷⁹ *Id.* paras. 154-155.

⁸⁰ *Id.* para. 156.

Bosphorus does not offer any guidance as to how a conflict that would arise in the event of rebuttal of the presumption would be resolved. This is primarily because of the lack in that case of any Article 103 argumentation, which in turn resulted from the framing of *Bosphorus* as a conflict between the EU and the ECHR and *not* as a conflict between the ECHR and SC Resolutions. Because of the court's avoidance of Article 103 in *Behrami* these matters remain largely unresolved in ECHR jurisprudence.

C. The United Kingdom

The House of Lords considered how it might reconcile seemingly incompatible obligations of the United Kingdom (UK) under SC Resolutions on the one hand and international human rights treaties as incorporated into domestic law on the other in the recent case of *R (Al-Jedda) v Secretary of State for Defence*.⁸¹ The case concerned the extent to which the prolonged detention of the applicant in Iraq under SC Resolution 1546 was incompatible with the right to be free from arbitrary detention under Article 5 ECHR as incorporated into domestic law by the Human Rights Act 1998. Although not charged with any offence, Al-Jedda, a dual UK and Iraqi citizen, had been held in security detention by UK forces in Iraq since 2004. Having determined that Al-Jedda's detention was attributable to the UK as opposed to the UN (thereby establishing the court's jurisdiction *ratione personae*)⁸² the House of Lords proceeded to consider the extent to which Chapter VII Resolutions could override or qualify fundamental rights guaranteed under the ECHR. In the leading speech, Lord Bingham accepted that the UK was obliged to detain Al-Jedda and that this gave rise

⁸¹ [2008] 1 AC 332.

⁸² Jurisdiction *ratione loci* for actions of United Kingdom troops operating abroad had been established in the earlier House of Lords case of *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153. According to the Law Lords in that case UK troops were bound by the Human Rights Act in relation to individuals within their custody even if physically located outside of the territory of the United Kingdom itself.

to a dispute between this obligation and those arising under Article 5 ECHR. He held that this could be resolved by reference to Article 103 of the UN Charter. He rejected any suggestion that human rights treaties have a different relationship to Article 103 than do other (i.e., non-human rights) treaties or international agreements or that non-Charter human rights obligations were not subject to the supremacy of the Charter-based obligations.⁸³ In Lord Bingham's view there was no basis for drawing such a conclusion save where a human right could be said to have the status of *jus cogens*, which, according to the House, was not true for the right to be free from arbitrary detention.⁸⁴ Lord Bingham did acknowledge that the difficulty inherent in holding that the UN could mandate actions that violate individual rights given the inclusion of the promotion and enforcement of human rights as a mission of the UN in the Charter.⁸⁵ Still, he accepted that there could be situations of competing obligations arising from SC Resolutions. In his view, states must fulfil their SC obligations but ought to do so in a manner that minimizes interference with individual rights to the extent possible. At paragraph 39, he held:

There is a clash between on the one hand a power or duty to detain exercised on the express authority of the SC and, on the other, a fundamental human right which the United Kingdom has undertaken to secure to those...within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the United Kingdom may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by United Nations SC Resolution 1546

⁸³ *Id.*, para. 35.

⁸⁴ For a critique of this position and of the Law Lords' failure to give this particular consideration see Alexander Orakhelashvili, *R (On the Application of Al-Jedda) (FC) v Secretary of State for Defence* 102 AMERICAN JOURNAL OF INTERNATIONAL LAW 337 (2008).

⁸⁵ [2008] 1 AC 332, para. 39.

and successive resolutions, but must ensure that the detainees' rights under Article 5 are not infringed to any greater extent than is inherent in such detention.

Al-Jedda lays down an important principle of minimal interference with fundamental rights in the implementation of SC Resolutions and the UK courts' willingness to take rights-based claims into account in relation to actions mandated by the SC. The same willingness was once more evident in the Court of Appeal's recent decision in *A & Others v Her Majesty's Treasury*,⁸⁶ in which domestic measures implementing the asset-freezing regimes were challenged. These measures were the Al-Qaida and Taliban (United Nations Measures) Order 2006 (the 'Al-Qaida Order', implementing the 1267 regime) and the Terrorism (United Nations Measures) Order 2006 (the 'Terrorism Order', implementing the 1373 regime). The five applicants in this case had all been designated by the Treasury under the Terrorism Order and one of the applicants—known in the litigation as 'G'—had also been designated under the Al-Qaida Order given his inclusion in the Consolidated List. The applicants challenged their designation on the basis of an alleged violation of rights (particularly due process rights) in the course of the designation process. Clarke MR accepted that one's designation under either of these Orders had the capacity to create a considerable burden for designated individuals and for their families and was particularly concerned with a designated individual's capacity to mount an effective challenge.

The Terrorism Order provided in Article 5(4) that "The High Court...may set aside a direction on the application of—(a) the person identified in the direction, or (b) any other person affected by the direction". The judge at first instance had found this an

⁸⁶ [2009] 3 WLR 25.

inadequate safeguard for individuals' rights as there was no express provision for the inclusion of intercept evidence or for the appointment of a Special Advocate⁸⁷ to argue the case on behalf of the applicant in cases where evidence was deemed too sensitive for disclosure. Yet, the Court of Appeal held that even in the absence of an express provision "there is no reason in principle why a special advocate should not be appointed in a particular case".⁸⁸ The fact that the court has a residual power to appoint a Special Advocate is, the court held, an important protection for designated individuals. Indeed, where no Special Advocate could be appointed, Clarke MR was apparently of the view that this ought to result in the discharge of the order.⁸⁹ The court also considered the fact that there was an alternative—more rights protective—mechanism available to the state (namely, the procedure outlined in s.s. 17 and 18 of the Regulation of Investigatory Powers Act 2000) not to be fatal to the Treasury's case.⁹⁰

In considering the same claim in relation to the Al-Qaida Order, the Court of Appeal referred to the House of Lords decision in *R (Al-Jedda)* considered above. It held that the impact of that decision in the context of the implementation of asset freezing obligations flowing from SC Resolutions is that "the court has power to consider an application for judicial review by a person to whom the [Order] applies as a result of designation by the [Sanctions] Committee".⁹¹ Where such an application is made, the Court may, to the extent possible, consider what the basis of this listing was. Unfortunately, however, the court was somewhat vague on how such a challenge

87 Special Advocates are lawyers appointed by the State to act on behalf of individuals where the information upon which the state's case is based is particularly security-sensitive. While the Special Advocates originally began working in the context of immigration law they are now widely used in terrorism-relation cases. See the Special Immigration Appeals Commission Act 1997 (UK).

88 [2009] 3 WLR 25, p.48, para. 58, relying on *R (Roberts) v Parole Board* [2005] 2 AC 738.

89 *Id.*, p. 48, para. 60.

90 *Id.*, p. 49, para. 65.

91 *Id.*, p. 64, para. 119.

would operate. In particular, it did not specify how the challenge could proceed where the individual's listing was done at the UN level without the active participation of the United Kingdom, meaning that the domestic authorities might not in fact be fully appraised of the case against the individual. That, however, was not the case in relation to the single applicant here who was affected by the Al-Qaida Order.⁹²

Two important points can be made about the interaction between *R (Al-Jedda)* and *A & Ors*. The first is that in considering whether the freezing process imposed by the Terrorism Order was consistent with the requirements of the ECHR, Clarke MR did not consider the failure to implement the general obligation in the least-rights-violating manner available to be a cause for invalidity. This is notwithstanding the House of Lord's decision in *Al-Jedda* that the appropriate means of reconciling apparently conflicting obligations is to ensure that obligations under SC Resolutions are implemented with the least possible degree of rights violation.⁹³ Secondly, the court's treatment of how challenges can be made to designations under the Al-Qaida Order—where the listing has been made at the UN level—reveals the extent to which process deficiencies at the international level may be essentially irresolvable at the domestic level. Whether or not the domestic designation would be quashed as a result of this process deficit is not entirely clear, but it appears that when read with *Al-Jedda*, they would not. The interference with rights at this level has its source in the listing process within the UN and the nation state is obliged to implement those listing decisions. In such cases, it may be difficult, if not impossible, to minimize rights violations by means of domestic judicial processes. This further reinforces the importance of ensuring that the processes at, and feeding into, the UN system are as

⁹² *Id.*, para. 120, p. 64.

⁹³ Leave for appeal was granted by the House of Lords on 3 March 2009 and the relationship between *Al-Jedda* and *A & Ors* is likely to be one of the matters considered by the Law Lords when the case reaches the House.

protective of individual rights as possible.

D. France

The French courts have recently considered a number of cases concerning potential conflicts between Chapter VII Resolutions and French human rights norms. Although Article 55 of the 1958 French Constitution provides that duly ratified international treaties and agreements “shall prevail over Acts of Parliament subject, for each agreement or treaty, to reciprocal application by the other party”, the *Conseil d’Etat* (Council of State)⁹⁴ has, in an analogous manner to the approach of the German Constitutional Court discussed below, held that the principle of primacy reaches its limits in a situation where EU law fails effectively to protect fundamental principles of the French constitution.⁹⁵ However, there has been some controversy as to whether SC Resolutions can, in principle, have direct effect (in the sense of conferring rights and obligations on individuals) in the French legal order,⁹⁶ with many leading commentators holding the view that they cannot.⁹⁷ This view was confirmed by the *Cour de cassation* (Court of Cassation) in a 2006 case concerning the question whether the Iraqi state had, by virtue of a Chapter VII Resolution which had not been transposed into French law, lost its immunity from prosecution.⁹⁸ In general, therefore - unless legislation has been passed at EU level to implement a Resolution - enabling

94 As with many civil law jurisdictions, the French court system is not the typical pyramid structure of common law jurisdictions. Rather, it is structured in three separate “branches”: the ordinary courts, headed by the *Cour de Cassation*; the administrative courts, headed by the *Conseil d’Etat*; and the *Conseil constitutionnel* (Constitutional Council).

95 See, for instance, Conseil d’Etat, December 3, 2001, Syndicat National de l’Industrie de Pharmaceutique; Conseil d’Etat, Arcelor, February 8, 2007, ADJA, 2007, 577.

96 See, for instance, Marie-Pierre Lanfranchi, *La valeur juridique en France des resolutions du Conseil de sécurité* ANNUAIRE FRANÇAISE DE DROIT INTERNATIONAL 31 (1997).

97 See, for instance, the arbitral tribunal in *Libyan Airlines c/Air France*, sentence partielle nr. 2 of March 11, 2000, nr. 64 (tribunal “ne doute pas que les resolutions du Conseil de sécurité ne sont pas d’application directe.”). See contra, Jean-François Lachaume, *Jurisprudence française relative au droit international* ANNUAIRE FRANÇAISE DE DROIT INTERNATIONAL 895 (1991) and M. Sastre RGDI publ. nr. 2/1998, 495.

98 Cass. civ. 1, April 25, 2006, Etat Irakien c/Dumez.

legislation must be relied upon as the basis for transposing such Resolutions into French law.⁹⁹

France has traditionally adopted a rather narrow role for judges' review of governmental activity, and especially of the legislative function, stemming from the historical distrust of the *gouvernement des juges* and the ensuing centrality of a strict separation of powers doctrine to the French legal system.¹⁰⁰ Thus, review of international obligations for compatibility with the French constitution - including its human rights norms - can only be carried out by the *Conseil constitutionnel* (Constitutional Council), and only where an implementing domestic law is required and has not yet entered into force.¹⁰¹ Further, the *Conseil d'Etat* has consistently held that it has no power to review the legality of Chapter VII Resolutions, nor of French domestic laws implementing such Resolutions, as *actes de gouvernement* benefiting from immunity from judicial review.¹⁰² An example is *Société Héli-Union*, in which a French decree implementing a Chapter VII Resolution imposing restrictions on trade with Libya was held not to be severable (*détachable*) from the conduct of French international relations and thus escaped from all judicial review where the decree essentially transcribed the Resolution's requirements.¹⁰³ The key question is therefore whether the domestic act challenged is severable from the relevant Chapter VII Resolution. In assessing severability, the issue will be whether the domestic act is limited to drawing the automatic consequences from an international obligation, or

99 See generally, Genevieve Burdeau and Brigitte Stern, *France* in VERA GOWLLAND-DEBBAS (ED.), NATIONAL IMPLEMENTATION OF UNITED NATIONS SANCTIONS: A COMPARATIVE STUDY (2004).

100 See generally, JOHN MERRYMAN AND ROGELIO PERDOMO, THE CIVIL LAW TRADITION (2007) and ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000).

101 See Articles 53, 54 and 61 of the 1958 Constitution and C. Maugué, "Le Conseil constitutionnel et le droit supranational", *Pouvoirs* 2003-2 (nr 105), 53.

102 See Franc and Boyon AJDA 1975, 456 ("Si le juge administrative s'interdit d'apprécier la légalité de certaines décisions, c'est seulement en raison des limites qui résultent de l'application des règles classiques de compétence... juges des actes de droit interne, il ne peut connaître de ceux qui se rattachent aux relations de la France avec d'autres Etats ou avec des organisations internationales.")

103 See, for instance, Conseil d'Etat, December 29, 2007, Société Héli-Union, RFDA 1998, 208 and see also Conseil d'Etat, March 12, 1999, Société Héli-Union, req. nr. 162.131.

conversely whether the state is left a margin of manoeuvre in implementing such obligation.¹⁰⁴

The leading case dealing with the relationship between obligations flowing from Chapter VII Resolutions and human rights is, however, the 2004 decision of the *Conseil d'Etat* in *Association Secours Mondial de France*. In this case, the applicant, an ostensibly charitable organization, sought to annul a French decree of 2002, which included it in a list of persons who could only engage in financial transactions with third countries following the approval of the French ministry of the economy and finances.¹⁰⁵ The application was based on the lack of reasoning for the listing decision, the failure to allow the Association to make observations on the decision and the lack of substantive grounds for the decision. In contrast to *Société Héli-Union*, the *Conseil d'Etat* held that it did have jurisdiction to review this decree as it could be considered to be severable from the conduct of French international relations. This was so because the decree went beyond what was required by the Resolution, as evidenced by the lapse of time between the Resolution and publication of the decree (eight months). This represents a narrowing of the concept of *actes de gouvernement* in the context of implementing Chapter VII Resolutions and a concomitant broadening of the scope for judicial review of domestic measures implementing such Resolutions, where no exact transposition has taken place.¹⁰⁶ In particular, the mere fact that a domestic measure can be said to follow from a Chapter VII Resolution, in a general sense, is now clearly insufficient to isolate such measure from judicial review. Rather, a case-by-case analysis will be undertaken to determine the extent to which

104 See, for instance, A. Bacquet, *Note on Conseil d'Etat*, Sect., July 13, 1979, Coparex, AJDA 1980, 371.

105 The decree was made pursuant to Article L 151-2 of the *Code monétaire et financier*, mentioned above.

106 See, for instance, L. Burorgue-Larsen, AJDA, April 4, 2005, 723 and G. Clamour, RECUEIL DALLOZ, 2005, nr 12, 825.

the national law is an autonomous state measure.

However, the *Conseil d'Etat* went on to reject the applicant's argument that the decree should be annulled because the applicant's right to be heard had not been respected. In reaching this conclusion, the *Conseil d'Etat* reasoned that, although a general right existed in law for parties potentially affected by administrative decisions to present written and, potentially, oral observations before such decision were taken,¹⁰⁷ this right did not extend to situations where the reasons for the decision comprised national defence secrets.¹⁰⁸ It appeared from the file and from the "information available to the French authorities"¹⁰⁹ that this was so in the case at hand. Importantly, even though the *Conseil d'Etat* did not itself have sight of the information on which the decision to list was based, it nonetheless believed that it had sufficient information to decide that such decision was not an "error of appreciation".¹¹⁰ In coming to this conclusion, the *Conseil d'Etat* did not use the possibility (available to it under French law) to inquire further into the nature of the information at issue, including the possibility of referring the matter to the Consultative Commission on Defence Secrets set up in 1998 to give advice on the declassification and release of national security information in court cases.¹¹¹ A further point of note in the *Conseil d'Etat*'s decision

107 As provided for in the Law of April 12, 2000, Article 24 and the Law of July 11, 1979, Articles 1 and 2.

108 Applying Article 413-10 of the *Code Pénal*.

109 See G. Clamour, *RECUEIL DALLOZ*, 2005, nr 12, 827, who comments that such information generally takes the form of anonymized documents (les *blancs*) produced by the *services des renseignements généraux* (a branch of the French national police) without reference, signature or indication of the source of the information provided.

110 The *Conseil d'Etat* further noted that the applicant had "confined itself to arguing that it was an independent humanitarian organisation" whose statutory objects had raised no objection at registration, which argument was not sufficient to call the decision into question.

111 Law nr 98/567 of July 8, 1998 instituting a Consultative Commission on National Defence Secrets (*Commission consultative du secret de la défense nationale*). Nor did the *Conseil* make use of its general powers to direct that all measures should be taken which are necessary to obtain sufficient information to allow it to come to a decision (see *Conseil d'Etat*, Sect, June 26, 1959, *Synd algérien de l'éducation surveillée* CFTC, Lebon, 399). See further, G. Clamour, *RECUEIL DALLOZ*, 2005, nr 12, 827, who argues that the *Conseil d'Etat*'s standard of review was more intense than one might have expected, because it did not use the language of "manifest" error of appreciation. However, one might note that the outcome would have been no different from the applicant's perspective had such language been used.

is its holding that the French decision to list the applicant was “corroborated” by the decisions of the SC¹¹² and the European Commission¹¹³ to place the applicant on their respective asset-freezing lists, which decisions were taken some days after the French decree. This type of reasoning is potentially dangerous for obvious reasons: the UN and/or European Commission may equally point to the (preceding) decision of the French authorities as corroboration for their own decisions. In such a situation, the listed person or entity may be faced with an eternal circle of finger-pointing between the different listing authorities, with each corroborating the other, but with no obvious way of identifying or accessing the information which led to the initial listing.¹¹⁴

Finally, it should be noted that, although review of the validity of an international norm for conformity with the French constitution can only be carried out by the *Conseil constitutionnel*, the *Conseil d’Etat*¹¹⁵ and the *Cour de cassation*¹¹⁶ have nonetheless held that international norms should, where possible, be interpreted in conformity with constitutional principles. Therefore, this approach would open the possibility of these courts interpreting Chapter VII Resolutions (and their implementation requirements) in conformity with French constitutional human rights norms.

E. Germany

In Germany, most treaties are concluded at the federal level, becoming part of domestic federal law with the adoption of a domestic law of ratification. Although Article 24(1) of the German Constitution states that, “the Federation may by

112 Resolution 1267/2002.

113 Regulation 1893/2002.

114 See contra, L. Burorgue-Larsen, AJDA, April 4, 2005, 725, who welcomes the decision as an example of reliance on international and EC action by the *Conseil d’Etat* in support of its conclusion.

115 Conseil d’Etat, Koné, July 3, 1996, RFDA, 1996, 982; Conseil d’Etat, Sarran, October 30, 1998.

116 Cour de Cassation, Pauline Fraisse, June 2, 2000, RGDIP, 2000, 815.

legislation transfer sovereign powers to international organisations”, it is accepted that such transfer has not taken place in the case of the UN. In consequence, Chapter VII Resolutions do not have direct effect in the German legal order, but instead require transposition into domestic law,¹¹⁷ save for cases where implementation is achieved by (directly effective) EC Regulations.¹¹⁸ As a result, unless they are implemented into national law, Chapter VII Resolutions do not enjoy primacy over provisions of national law, including national fundamental rights provisions. However, a general principle of judicial interpretation exists whereby domestic legislation is presumed to be intended to comply with international obligations unless there is specific evidence of legislative intention to the contrary.¹¹⁹

Where Chapter VII Resolutions are implemented by EC law, in principle the doctrine of primacy of Community law holds that German courts have no power to review the EC measure for compatibility with domestic law. However, the *Bundesverfassungsgericht* (Federal Constitutional Court, or BVerfG) has famously set what it considers to be the limits of the doctrine of primacy in the *Solange* and *Brunner* judgments. The upshot of these judgments is essentially that the BVerfG has preserved its final authority to exercise review over EC law if problems relating to fundamental rights arise, although it has recognized that the EC generally ensures effective protection of fundamental rights in the EC legal order to a substantially

¹¹⁷ See, for instance, Federal Court of Justice, judgment of April 12, 1995, *Neue Zeitschrift für Strafrecht* 1995, 551; judgment of April 21, 1995, BVerfGE in *Strafsachen*, vol 41, 127, 129; and judgment of September 28, 1995, *Neue Juristische Wochenschrift* 1996, 602.

¹¹⁸ In some cases, the text of such Regulations has been transposed into domestic law, although such transposition is not strictly speaking permitted as a matter of EC law (as Regulations are meant to become part of the national legal order automatically, without transposition). See, for instance, Case 50/76 *Amsterdam Bulb* [1977] ECR 137, ERIKA DE WET, ANDRÉ NOLLKAEMPER AND PETRA DIJKSTRA (EDS), *REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES* (2003), at 47 and Jochen Frowein and Nico Krisch, *Germany* in VERA GOWLLAND-DEBBAS (ED.), *NATIONAL IMPLEMENTATION OF UNITED NATIONS SANCTIONS: A COMPARATIVE STUDY* (2004), at 243-244.

¹¹⁹ See the decision of the BVerfG of March 26, 1987, BVerfGE, vol 74, 358, 370 and the judgment of the Federal Court of Justice of September 28, 1995, *Neue Juristische Wochenschrift*, 1996, 603.

similar extent as required by the *Grundgesetz* (German Constitution).¹²⁰ This view was most recently repeated in the BVerfG's June 2009 *Lisbon* decision,¹²¹ in which it rejected claims that the integration of the Charter of Fundamental Rights under the Treaty of Lisbon would necessarily infringe German constitutional rights;¹²² yet, the Court also emphasized the importance of true democratic control - at present, achievable only at the domestic level - over areas affecting fundamental rights.¹²³ Such areas include, in particular, criminal law as well as 'justice and home affairs'.¹²⁴ In sum, a decision by the German courts to exercise this residual power to review measures for compatibility with fundamental rights would be unlikely, although not impossible, since it would necessitate a holding that the EC legal order in general failed to deliver an adequate level of rights protection.

In contrast, where a Chapter VII Resolution is implemented by means of domestic measures the German courts retain jurisdiction to review such norms for compatibility with fundamental rights as set out in the *Grundgesetz*. An obvious potential conflict is that between obligations flowing from a Chapter VII Resolution and Article 14 of the *Grundgesetz*, which protects the fundamental right to property, subject to restrictions which are justified and proportionate to the aim pursued. However, interferences with existing contracts relating to foreign trade (for instance, in the case of embargos) have been held not to contravene this right, due to the unstable nature of such trade and the

120 See *Internationale Handelsgesellschaft* [1974] 2 CMLR 540 ("Solange I"), *Re Wünsche Handelsgesellschaft* [1987] 3 CMLR 225 ("Solange II"), *Brunner v The European Union Treaty* [1994] 1 CMLR 57 ("Maastricht"). Thus, in its *Bananas* decision of June 7, 2000, the BVerfG ruled inadmissible a claim that EC Regulations on the common market organization in bananas breached fundamental rights set out in the *Grundgesetz*, declaring that the human rights protection in the EC legal order was still generally comparable to that in the German legal order, BVerfGE, 102.

121 BVerfG's *Lisbon* decision of June 30, 2009, available at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html, paras 191 and 337.

122 *Id.*, paras 188 onwards.

123 *Id.*, para 212.

124 *Id.*, paras 253 ("In [the criminal law] context, which is of importance as regards fundamental rights, a transfer of sovereign powers beyond intergovernmental cooperation may only under restrictive preconditions lead to harmonisation for certain cross-border circumstances; the Member States must, in principle, retain substantial space of action") and 319.

fact that such interferences are generally foreseeable.¹²⁵ In cases where such rights are breached, it would seem likely that the German courts would find the breach not to flow necessarily from Germany's obligation to implement Chapter VII Resolutions, but rather from the exercise of discretion at the national level in achieving such implementation. In a variety of cases to date, the German courts have struck down domestic measures flowing broadly from Chapter VII Resolutions but in all these cases, German implementation involved the exercise of discretion. A recent example is the June 2009 judgment of the Munich *Oberlandesgericht* (Higher Regional Court) in the *Saeed S.* case, which concerned criminal charges brought against a German-Iranian businessman who had supplied trucks to Iran in contravention of the German trade embargo with Iran. The terms of the embargo went beyond the requirements of the EU's sanctions but, according to the German government's contention, were necessary to avoid a "significant threat to Germany's foreign relations", as such trucks might be used as rocket launchers against, in particular, Israel. In holding that the prosecution could not proceed, the *Oberlandesgericht* indicated that the German embargo disproportionately infringed economic freedom and was incompatible with the more lenient EU sanctions regime.¹²⁶ However, the BVerfG's decision in *Görgülü* suggests that it would be unlikely that national measures implementing Chapter VII

125 See further, Jochen Frowein and Nico Krisch, *Germany* in VERA GOWLLAND-DEBBAS (ED.), NATIONAL IMPLEMENTATION OF UNITED NATIONS SANCTIONS: A COMPARATIVE STUDY (2004), at 257. Further possible conflicts may arise with regard to the fundamental right to privacy. In German law, this encompasses a right of data protection (*Informationelle Selbstbestimmung*, or "informational self-determination"), itself linked to the protection of human dignity and personal liberty guaranteed by the *Grundgesetz* and subject to proportionate limitations (*Grundgesetz*, Articles 1(1) and (2)(1). For the right of informational self-determination, see the Population Census decision of the BVerfG, December 15, 1983, decisions vol. 65, 1). Pursuant to a February 2008 decision of the BVerfG, it also extends to a right to confidentiality in information technology systems, save in a case of a concrete threat to life, personal liberty or state institutions.

126 An appeal is currently pending before the *Bundesgerichtshof* (Federal Court of Justice). A further example is the case of Metin Kaplan, which concerned a request from the Turkish government for the extradition of the leader of a banned Islamic fundamentalist group, "Caliphate State", where the court was not convinced by diplomatic assurances provided by Turkey that Kaplan's treatment and prosecution would conform with human rights obligations. *Oberlandesgericht* Düsseldorf, judgment of May 27, 2003, 4Ausl (a) 308/02-147.203-204.03III.

Resolutions, even directly, would be granted immunity from judicial review under German law- although the case was not concerned with a conflict between a national constitutional right and a Chapter VII Resolution, but rather between such a right and an ECHR right.¹²⁷ In that case, the BVerfG emphasized once again the ultimate supremacy of the *Grundgesetz* over international agreements to which Germany is a party - in that case, the ECHR - while reiterating that all German courts were obliged to interpret ordinary and constitutional law in accordance with the ECHR, as interpreted by the ECtHR.

F. The ECJ's Judgment in *Kadi*

When the *Kadi* appeal came before the ECJ that court had a number of options, bearing in mind the source of the obligation being implemented (the SC), the alleged superiority of that obligation over EC law (based on Article 103, UN Charter), the lack of discretion within the impugned regime (the 1267 regime) and the apparent foreign affairs nature of the measure. Rather than avoid subjecting the asset-freezing regime to strict rights-based scrutiny on any or all of these bases, the ECJ in fact conducted a strict rights-based review of the contested Regulation.

The first issue considered by the ECJ was whether the choice of Articles 60, 301 and 308 EC as legal bases for the contested Regulation was correct. As use of these legal bases is standard practice in the EC smart sanctions regime, the potential implications of this issue were considerable. However, the ECJ approved the use of these legal bases, upholding the outcome - although not the reasoning - of the CFI's judgment on this point. To begin, the ECJ confirmed that Articles 60 and 301 EC in themselves would not, contrary to the Commission's submissions on appeal, have been sufficient

¹²⁷ BVerfG, Order of October 14, 2004, 2 BvR 1481/04, reported in NJW 2004, 3407.

legal bases for smart sanctions such as the contested Regulation. The Commission's approach on this point was motivated by its preference, typical in legal basis disputes, for use of legal bases requiring qualified majority voting in the Council (as with Articles 60 and 301 EC), rather than unanimity of voting (as with Article 308 EC). Although Advocate General Maduro had found the Commission's argument on this point convincing,¹²⁸ the ECJ rejected such an extensive interpretation of Articles 60 and 301 EC, which on their wording refer only to restrictive measures as regards third countries. As a result, smart sanctions such as those at issue in the contested Regulation, which were "notable for the absence of any link to the governing regime of a third country",¹²⁹ could not reasonably be based on these articles alone.¹³⁰ The ECJ's preference for a textual interpretation is clearly right: any attempt artificially to inflate the scope of a legal basis provision beyond its natural meaning flies in the face of the principle of conferred powers,¹³¹ a fundamental principle of EU constitutional law whereby the EU has competence to act only insofar as such competence has been expressly granted to it by the masters of the Treaties, the member states.¹³²

It followed that the addition of Article 308 EC as a third legal basis for the contested Regulation was indeed necessary. In so concluding, however, the ECJ rejected the CFI's reasoning to the effect that Article 308 EC formed a bridge enabling economic sanctions in the sense of Articles 60 and 301 EC wherever necessary to achieve an objective of the CFSP.¹³³ Once again, the ECJ preferred a narrower, more textual

128 Kadi, Opinion, paras 11-16

129 *Id.*, para 167.

130 *Id.*, paras 166-170.

131 Article 5(1) EC.

132 Judicial attempts to do so in the past - in more borderline cases than the present - have drawn criticism for judicial activism as illegitimate expansion of the EU's competences without sign-off by the member states (so-called "competence creep"). See, for instance, the multitude of cases on the scope of Article 95 EC (eg Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419).

133 Kadi, paras 194-205.

interpretation of Article 308 EC, noting that this article enables measures to be passed where necessary to achieve an objective of the EC, not one of the CFSP.¹³⁴ Effectively, the CFI's argument sought to blur the distinction between the EC and the CFSP - and thus the constitutional structure on which the EU Treaties are based. Instead, the ECJ adopted a more traditional mode of reasoning, whereby recourse to Article 308 EC was justified in furtherance of a Community aim which, although not explicitly set out in Articles 60 and 301 EC, could be objectively implied from those articles,¹³⁵ particularly as unilateral national measures in this area "could create distortions of competition" contrary to the aims of the common market.¹³⁶ This followed the ECJ's previous jurisprudence on Article 308 EC, holding that this provision enables measures which do not go beyond the general framework of the EC Treaty as a whole.¹³⁷ It also, however, implies that any "generalised"¹³⁸ asset-freezing measure must, in principle, be taken at the Community, rather than national level, as Community law does not permit member states to take action which risks compromising the common market.¹³⁹

The ECJ then considered the relationship between EU law and international law as a necessary preliminary point prior to considering whether the applicants' fundamental rights had been infringed by the contested Regulation. Here, the ECJ's approach differed fundamentally from the CFI's. The CFI had adopted a monist approach to the relationship between international and EU law, holding that Chapter VII Resolutions were in principle excluded from review by the EU's courts, save where they were in

¹³⁴ *Id.*, para 198.

¹³⁵ *Id.*, paras 226 onwards.

¹³⁶ *Id.*, para 230.

¹³⁷ See, for instance, Opinion 2/94 [1996] ECR I-1759, in which the ECJ held that accession to the ECHR would go beyond the framework of the Treaty in its present form (although, as noted above, such accession would be specifically enabled if the Treaty of Lisbon were to come into force).

¹³⁸ *Kadi*, para 230.

¹³⁹ See, for instance, Article 10 EC. See also Article 215(2) of the Treaty on the Functioning of the European Union.

breach of *jus cogens*.¹⁴⁰ Put otherwise, the CFI's approach meant that the validity of international law could only be reviewed for compatibility with another norm of the international legal order, but not with norms of the EU legal order. In reaching such a conclusion, the CFI regarded itself bound by Article 103 of the UN Charter.¹⁴¹ This approach, however, had been criticized by many commentators as itself going beyond the bounds permitted by international law:¹⁴² it would effectively have enabled unilateral review of the act of an international organization in a manner other than that provided for by the international legal order itself (i.e., review by the International Court of Justice).¹⁴³ The ECJ, following Advocate General Maduro's Opinion on this point, rejected this approach entirely. It preferred what is essentially a dualist approach: review of Chapter VII Resolutions themselves falls outside the jurisdiction of the EU courts, but measures implementing such Resolutions within the EU legal order may be reviewed for compliance with EU fundamental rights norms. The autonomy of the Community legal system which, pursuant to Article 220 EC, is exclusively assured by the EU's courts, could not, the ECJ held, be affected by an international agreement.¹⁴⁴ As respect for fundamental rights formed an "integral part" of the general principles of Community law, and as measures incompatible with respect for human rights were "not acceptable in the Community", it followed that "the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle

140 Case T-306/01 Yusuf and Al Barakaat [2005] ECR II-3533, para 277 and Case T-315/01 Kadi [2005] ECR II-3649, para 226.

141 Case T-306/01 Yusuf and Al Barakaat [2005] ECR II-3533, para 273 and Case T-315/01 Kadi [2005] ECR II-3649, para 222.

142 See, for instance, Jessica Almqvist, *A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions* 57 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 303 (2008).

143 Such review would admittedly be difficult to achieve, being possible only by way of (1) consultative opinion referred by a majority within one of the organs of the UN empowered under the UN Charter to make such a referral; or (2) in the context of dispute resolution between UN member states (as natural or legal persons cannot bring actions before the ICJ) which raises the issue of the validity of a Chapter VII Resolution.

144 Kadi, para 282.

that all Community acts must respect fundamental rights”.¹⁴⁵

Having thus set up the parameters for its jurisdiction in a profoundly dualist manner, the ECJ attempted to offer reassurance that it was not thereby challenging the primacy of international law in two ways. First, the ECJ emphasized that its review applied only to the Community act “intended to give effect to the international agreement at issue” - in this case, the contested Regulation - and not to the international agreement “as such.”¹⁴⁶ The CFI had therefore exceeded its jurisdiction in purporting to review a Chapter VII Resolution, albeit on the limited grounds of *jus cogens*. Second, recalling its case law set out in Part II of this essay (holding that the EC must respect international law in the exercise of its powers), the ECJ noted the particular status of Chapter VII Resolutions, and held that the Community was bound to “attach special importance” to the fact that such Resolutions constituted the exercise of the “primary responsibility” invested in the UN “for the maintenance of peace and security at the global level.”¹⁴⁷ However, and this point was crucial, the UN Charter did not “impose the choice of a particular model” for implementing such Resolutions.¹⁴⁸ Nor could any provision of the EC Treaty authorize any derogation from the fundamental rights principles which formed a foundation of the EU.¹⁴⁹ In particular, even though Articles 297 and 307 EC could in principle allow for unilateral derogations from other vital areas of EC external policy - for instance, the EC’s common commercial policy - these provisions could in no case “be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union.”¹⁵⁰

¹⁴⁵ *Id.*, paras 283-285.

¹⁴⁶ *Id.*, para 286.

¹⁴⁷ *Id.*, para 294.

¹⁴⁸ *Id.*, para 298.

¹⁴⁹ *Id.*, para 303.

¹⁵⁰ *Id.*, para 303. The ECJ expressly distinguished Case C-124/95 *Centro-Com* [1997] ECR I-81, in which Article 307 EC was held, under certain conditions to allow derogations from the EC’s common

As a separate point, the ECJ considered arguments that it should follow the approach of the ECtHR in *Behrami* and *Saramati*, i.e., decline jurisdiction to review the compatibility of measures implementing Chapter VII Resolutions, as discussed above. Rejecting such arguments, the ECJ reasoned that these cases, involving acts directly attributable to the UN, were “fundamentally different” to the case at hand, concerning measures which were not so attributable. Crucially, however, the ECJ held that it would have reached the same conclusion without this fundamental difference.¹⁵¹ Attribution, therefore, was not decisive for the integrity of fundamental rights’ place within the internal legal order.

Moreover, the ECJ went on to reject the Commission’s argument that a *Solange*-type approach should be adopted, similar to that of the German Constitutional Court discussed above, under which the ECJ should forego any review of the contested Regulation because in the UN’s system of sanctions as a whole, fundamental rights were adequately protected.¹⁵² Although recognising that improvements had been made to the listing and de-listing procedures, the ECJ found that this could not give rise to “generalised immunity from jurisdiction” within the EC legal order, as the essentially diplomatic delisting procedure before the Sanctions Committee did not guarantee judicial protection.¹⁵³

Finally, the ECJ went on to consider whether the applicants’ fundamental rights had been breached in the instant case. Dealing with this shortly, it held that the rights of the defence, particularly the right to be heard, and the right to effective judicial review of those rights, had “patently” not been respected.¹⁵⁴ These rights required that the

commercial policy.

¹⁵¹ Kadi, para 315: “In addition and in any event...”

¹⁵² *Id.*, paras 318-319.

¹⁵³ *Id.*, para 321-326.

¹⁵⁴ *Id.*, paras 334-372.

Community communicate the grounds for inclusion on a blacklist to the person or entity concerned, “so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision.”¹⁵⁵ In the interests of effectiveness of the measure, the ECJ held that neither communication of the measure nor a hearing of the affected party was required prior to the taking of the decision. Rather, a balance was necessary between security concerns to protect sources on the one hand, and the needs of procedural justice on the other.¹⁵⁶ In the present case, however, as no justificatory information had been communicated to the applicants whatsoever, there had been an unjustifiable and patent breach of fundamental rights. Similarly, the ECJ agreed with Kadi’s argument that his right to property had been violated. Although recognizing that this right was not absolute and that, in principle, asset freezing measures might be justified by fundamental objectives of counter-terrorism, the ECJ considered that in Kadi’s case no such justification existed.¹⁵⁷ This was, once again, because no reasonable opportunity had been given to him to put his case to the competent authorities. As a result, the contested Regulation was annulled as regards the applicants. The ECJ exercised its discretion under Article 231 EC, however, to maintain the Regulation’s effects for up to three months from the judgment’s date of delivery.

Following the judgment, the EU sought from the Sanctions Committee the relevant statements of reasons forming the basis for the applicants’ listing and communicated these to the applicants for comment. Having evaluated the comments received, and just within the ECJ’s three month deadline, the Commission adopted a new Regulation maintaining the applicants on the blacklist.¹⁵⁸

¹⁵⁵ *Id.*, para 336.

¹⁵⁶ *Id.*, para 344.

¹⁵⁷ *Id.*, paras 359-371.

¹⁵⁸ Regulation 1190/2008 of November 28, 2008 OJ 2008 L 322/25.

IV. *Kadi's External and Internal Significance*

Does the ECJ's decision in *Kadi* represent a new, or at least a different, way of considering norm conflicts operating on states as a result of the multiple layers of international obligations they now operate under? In order to answer this question, we must consider the framing decisions of respective courts. In all of the pre-*Kadi* decisions on the relationship between security-based obligations flowing from SC Resolutions and human rights law obligations we have surveyed in this article, the matter of framing has been germane to the outcome. Critical legal scholars have long accepted that judicial institutions frame certain disputes in a particular way in order to arrive at a certain result.¹⁵⁹ Such framing is a particularly realist and result-oriented method of judging that, some observers claim, allows for judicial biases, politics and preferences to flow into and effectively determine a legal dispute. Framing decisions inevitably influence the outcome of disputes, but they also enable a court to determine the audience for its decision (beyond the parties immediately involved) and to sculpt the legal—and at times politico-legal—message that is to be delivered. In the case of *Kadi*, there were in fact two audiences to whom two discrete—although connected—messages were being communicated. On the one hand there was the ECJ's "internal" audience, i.e., the EU, its member states and EU citizens. On the other hand there was the ECJ's "external" audience, i.e. the UN SC, non-EU states and, potentially, other international organizations such as the Council of Europe.

A. Framing Decisions in the Jurisprudence Considered

The ECJ's framing of the decision in *Kadi* determined both the content and the effectiveness of these messages. However, as is demonstrated below, such framing

¹⁵⁹ See generally DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIECLE) (1997).

and message-communication has long been a feature of cases relating to norm conflicts between security and rights obligations. In the pre-*Kadi* jurisprudence considered in this Article, we identify five decisional frames some of which have overlapped within the cases at times. These are: 1. jurisdictional competence, 2. concentration on the source of the impugned measure, 3. deference, 4. primacy of the local legal order, and 5. human rights equivalence.

1. Jurisdictional Competence

Prior to engaging in any substantive consideration of how apparently conflicting obligations are to be resolved a court must satisfy itself that it has jurisdiction to consider the dispute before it. In two of the cases considered above—*Behrami* before the ECtHR and *Al-Jedda* before the UK House of Lords—the courts were asked to refuse jurisdiction on the basis of attribution of responsibility for the impugned actions or, to put it differently, for lack of jurisdiction *ratione personae*. In both of these cases the respondents argued that the acts impugned were in fact attributable to the UN rather than the individual states. The attribution decisions in both of these cases necessarily determined the extent to which the net question of norm conflict could be engaged in. Both courts reacted differently to these arguments relating to attribution: in *Behrami* the ECtHR accepted that in the particular circumstances of the case the respondent states were acting under the authority of the UN and, as a result, that their actions were not justiciable before the court.¹⁶⁰ In *Al-Jedda*, in contrast, the House of Lords held that the actions impugned were carried out by UK forces acting for the United Kingdom, not for the UN. The question of attribution in both cases was open to alternative interpretations—it has been forcefully argued that, in terms of the

¹⁶⁰ See analogously, the judgment of the ECtHR in *Boivin v France, Belgium and 32 other States of the Council of Europe*, Application No. 73250/01, judgment of September 9, 2008.

international legal principles of state responsibility, the respondent states in *Behrami* should have been considered as acting under their own authority and therefore subject to the jurisdiction of the court;¹⁶¹ in *Al-Jedda* the UK forces were acting within a multi-national force and, although under UK command, could have been constructed as acting on behalf of the UN (as, indeed, Lord Hoffman's dissent concluded was the case). The courts in question therefore essentially determined the extent to which the respective states' actions could be considered in depth by means of deciding on the matter of attribution and, *a priori*, jurisdiction *ratione personae*. Determination of the jurisdictional question can therefore act as a means of avoiding the question of norm conflict and particularly of the extent to which SC Resolutions can impinge upon, nullify, or qualify treaty-based human rights entitlements.

A separate type of jurisdiction-based decision is that of the ECJ in cases like *Segi* and *Gestoras* in which the ECJ has declined jurisdiction to review EU (CFSP or JHA) acts implementing Chapter VII Resolutions for compliance with fundamental rights. In these cases, the status of the impugned measures as EU, rather than EC, acts has been clear, meaning that the question of attribution has not generally been controversial (although, as discussed in Part III, the ECJ expanded the scope of its own jurisdiction in cases like *Segi* by looking at the substance, rather than the form, of a JHA measure to enable it to carry out review). In the case of CFSP measures - including Common Positions - the EU Treaty leaves no scope in its present form for any review by the ECJ. Although the blatant *lacuna* in judicial protection resulting from this state of affairs was expressly challenged in the cases discussed, ultimately it can only be changed by the EU member states by way of Treaty amendment.¹⁶² Their decision not

161 Marko Milanovic & Tatjana Papic, *As Bad as it Gets: The European Court of Human Rights's Behrami and Saramati Decision and General International Law* 58 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 267 (2009).

162 See the changes which would be brought about by the Treaty of Lisbon referenced at note _ above.

to extend the ECJ's jurisdiction to CFSP matters to date is a very deliberate one, reflecting the highly sensitive nature of this policy area, the reluctance of many member states to proceed to an advanced level of integration in this field, and a certain distrust of the ECJ's tendency to "constitutionalise" areas in which it is given jurisdiction.¹⁶³

2. The Source of the Impugned Measure

Closely related to the jurisdictional analysis of attribution is the question of the source of the impugned measure—does the challenged measure emanate from the local legal system or from the UN system and, if the former, are there grounds for determining that the local measure is at all distinguishable from the international measure or are they, in fact, identical so that judicial review of the local measure effectively constitutes judicial review of the international measure? This distinction appears to have been within the consciousness of judges in various jurisdictions considered in this article. It is reflected in the extent to which the state in question enjoys a degree of discretion, or as the Conseil d'Etat has put it, the extent to which the impugned measure if domestic can be said to be severable from the international measure.

As mentioned above, in *Bosphorous* the measure impugned before both the ECJ and the ECtHR was the local measure, i.e., the Regulation. By focusing on the European measure neither court was compelled to broaden its material investigation beyond the point of considering whether a European measure complied with a European standard (the rights-protecting standards and principles of both the EU and the ECHR being construed as providing equivalent levels of effectively protected fundamental rights).¹⁶⁴ Where the measures impugned are seen as local measures, then, the broader

¹⁶³ See the cases referred to at note _ below.

¹⁶⁴ See the ECJ's explanation of the distinction between *Behrami* and the ECtHR's *Bosphorus* judgment in *Kadi*, paras 312-313.

general international law question of the nature and impact of Article 103 can be avoided thus evading criticisms based on the institutional appropriateness of judicial review of the measure. Where the source of the impugned measures was said to be the UN SC, however, the rigor of the judicial review was generally lessened. In *Al-Jedda*, for example, although the House of Lords attributed the actions complained of to the UK, it construed those actions as being compelled by a Chapter VII Resolution and *therefore* as being capable of qualifying rights under the ECHR. In other words, the source of the obligation itself was said to determine the extent of the applicant's enjoyment of a right protected and secured by both an international treaty to which the state was a party (the ECHR) and a piece of domestic law incorporating and implementing that international treaty (the Human Rights Act 1998). In contrast, in *A & Ors* the measures impugned were domestic measures (Orders in Council) introduced pursuant to a piece of domestic legislation (the United Nations Act 1946) and implementing an international obligation (SC Resolutions 1267 and 1373). Since the actions complained of were in fact done under the authority of a domestic instrument, the court could find that domestic courts could hear an application for judicial review from a person whose assets were frozen under these orders—including the Al-Qaida Order implementing the Consolidated List under Resolution 1267—and could impose conditions on that judicial review (such as the appointment of a Special Advocate) in order to ensure the effective protection of individual rights.

Thus, by framing a dispute relating to the impact of a SC Resolution as one that essentially concerns local legal measures such as implementing instruments, courts can simultaneously assert their capacity for judicial review and avoid considering questions of general international law and particularly of how conflicting obligations are to be dealt with under Article 103 of the UN Charter. Such framing keeps courts

within the substantive legal territory with which they are familiar and can provide for a local-level mechanism for rights protection where the rights violations ultimately arise out of the creation of obligations on the international level. As is clear from the case of *A & Ors*, however, local framing can itself be problematic from the perspective of rights protection where the local violations not only flow from internationally generated obligations but substantively arise from deficits in due process at the international level.

A number of courts considered above, however, have tended to take into account the degree to which the local legal actors (either at the state or the regional level) have had discretion in relation to the implementation of measures from the SC. In other words, in some cases the analysis as to the source of a particular obligation has involved a consideration of the extent to which the local legal measure can be said to be so similar to the international measure and to leave so little discretion to the local legal actors as to make review of the local measure a proxy review of the international measure. Thus the extent to which the EU courts subjected implementing measures to muscular judicial review prior to *Kadi* appeared to be related to whether the measures were introduced by the EU using its own powers and exercising its own discretion as to the operation of the measures (as was the case in *PMOI*, *Sison* and *Ocalan*) or whether the Union had little or no discretion (as was effectively the case in *Bosphorus*). In the former cases, the implementing measures were thoroughly reviewed for their compliance with fundamental rights; in the latter case, the judicial review was much lighter, with the ECJ - although not declining jurisdiction to review the local measure - finding the rights restriction to be proportionate to the UN's aim of putting an end to war in the region. This approach can be contrasted with cases such as *Dorsch Consult*, in which the ECJ refused to award damages for a local

measure implementing Chapter VII Resolutions on the basis that the EC had no choice in such implementation.¹⁶⁵

A similar pattern is discernible in the French jurisprudence considered above. Once the domestic implementing measure is said to be doing nothing more than transplanting an international obligation, it appears to be free from judicial review because of its categorization as an “*acte de gouvernement*” in the field of international relations or foreign affairs. Where, in contrast, the domestic implementing measure is said to be ‘severable’ from the international obligation because, for example, it goes beyond that which is required by the motivating international obligation, it is subject to judicial review. Although the Conseil d’Etat has in recent years effectively expanded the scope of its jurisdiction by narrowing the scope of the concept of *actes de gouvernement*, this development has been accompanied by the adoption of a rather light form of judicial review (as, for instance, in *Association Secours Mondial de France*, on the basis that the case involved defence secrets). The approach of the Munich Oberlandesgericht in *Saeed S.*, in which the court reviewed a German implementing measure on the basis that it went beyond the standards required by the relevant EU and UN measures, is analogous.¹⁶⁶ On its face, the *ratio*¹⁶⁷ - although not the spirit - of the ECJ’s decision in *Kadi* itself falls into this category. Thus, the ECJ emphasized that UN law did not “impose the choice of a particular model for the implementation of resolutions adopted by the SC...since they are to be given effect in accordance with the procedure applicable...in the domestic legal order of each

165 Case T-184/95 Dorsch Consult [1998] ECR II-667, upheld on appeal in Case C-237/98 P. See also, Case T-47/03 Sison [2007] ECR II-73.

166 See also, by analogy, the approach of the French *Conseil constitutionnel* in Decision nr 2006-540 DC of July 27, 2006, in which it reviewed French measures implementing an EC Directive on the ground that the precise measures at issue were not in fact required by the Directive.

167 Although the term is not strictly speaking appropriate for ECJ judgments, the court not having a formal doctrine of precedent.

Member State of the United Nations.”¹⁶⁸ It followed, in the court’s view, that exclusion of judicial review of the relevant implementing measure was not required by the principles governing the international legal order.¹⁶⁹ The striking dissonance between this statement and the CFI’s conclusion that the EC had no “autonomous discretion”¹⁷⁰ in implementing the local measure illustrates perfectly how controversial, and crucially important, the courts’ framing decisions can be. In truth, the ECJ’s finding that there was room for manoeuvre for the EC in taking the implementing measure was artificial.¹⁷¹ Quite apart from this, however, the ECJ itself suggested that it would have come to the same conclusion even if no such discretion had existed.¹⁷²

3. Deference

The third category of framing is that of deference, by which we mean the decision by an adjudicating court to afford deference to a norm-creating or enforcing body. As a result, the impugned measure is subjected to light (or sometimes no) judicial review because of perceptions that either the institution involved or the subject-matter of the obligation being implemented are deserving of deference from the judiciary. In terms of institutional deference, the jurisprudence considered in Part III above reveals occasional instances of courts acting in a deferential manner towards the SC because of its perceived positioning within the international legal order. Thus in *Behrami*, having already determined that because the acts complained of were attributable to the UN and therefore outside of the jurisdiction of the court, the ECtHR went on to remark that SC actions relating to international peace and security could not be

168 Para 298.

169 Para 299.

170 Kadi, CFI, para 214.

171 See similarly, *Jacqué*, who complains of *hypocrisy* in the ECJ’s reasoning on this point (at 169).

172 Para 315.

reviewed by that court because of the centrality of the maintenance of peace and security to the mission of the UN and the role reserved to the SC in that arena by the UN Charter itself. In fact, the court remarked that to do anything *other than* afford a high degree of deference to the SC in this relation would run the risk of interfering with the UN's peace and security mission and disrupting its operations. While this comment was ostensibly *obiter dictum* (to borrow a common law classification) as the jurisdictional analysis had already resulted in the case being deemed inadmissible, it is nevertheless indicative of the high degree of institutional deference the court was willing to afford to the SC.

The CFI's decision in *Kadi* also reveals significant institutional deference towards the SC, following in particular from its findings that the EC was "bound by the obligations under the Charter of the United Nations in the same way as its Member States."¹⁷³ In these circumstances, "determining what constitutes a threat to international peace and security and the measures required to maintain or re-establish them"¹⁷⁴ was the responsibility of the SC alone and, as such, measures implementing Chapter VII Resolutions were not subject to review by the EU courts, save as to compliance with *jus cogens*. Although this caveat meant that deference to the SC's choices was not complete, the fact that the (exceptional) ground of review was itself a norm of the international legal order meant that such review would have diminished the challenge to the SC's authority. A similar approach has been adopted, for instance, by the Swiss Federal Supreme Court, which has declined to review Swiss measures imposing travel restrictions and freezing assets on the ground that they implemented Chapter VII Resolutions, subject only to review for compliance with *jus cogens*.¹⁷⁵

¹⁷³ *Kadi*, CFI, para 193.

¹⁷⁴ *Kadi*, CFI, para 219.

¹⁷⁵ *Nada v State Secretariat for Economic Affairs*, Bundesgericht, November 14, 2007, 133 BSE II 540-67.

The House of Lords' decision in *Al-Jedda* also reveals some limited deference to the SC. By acknowledging that SC Resolutions had the capacity to impose obligations on states that appear incompatible with their human rights obligations and that the role of the courts in such circumstances is to assess whether or not the SC obligations have been implemented with the minimum possible disruption of rights protections, the Law Lords implicitly deferred to the SC's institutional adjudication of what is required for the purposes of maintaining international peace and security *whether or not* the rights implications of such measures were effectively considered at the international level.

In addition to such institutional deference, courts considering the relationship between obligations flowing from SC Resolutions and human rights standards have at times also displayed subject-matter deference. Thus, where the security-related obligations imposed by SC Resolutions are framed as matters of international relations or foreign affairs, domestic courts can display a deference based on the traditional conception of these areas as executive functions that ought not to be reviewed by the courts. This is particularly evident in the jurisprudence of the French courts considered above. As a result of the constitutional commitment to a strict separation of powers within the French constitutional order the capacity to review Chapter VII Resolutions and domestic implementing measures has traditionally been recognized as particularly limited as such measures are considered to be part of the French conduct of its international relations. Even where—as in *Association Secours Mondial de France*—the measures impugned are considered severable from the foreign relations power, considerable deference has been afforded to the executive role in ensuring national security and, in the course of so doing, in imposing security measures on individuals based on undisclosed information. The extent to which this approach is deferential is

reflected in the fact that, as noted in Part III above, a domestic legal procedure specifically geared towards assessing questions of national security was not utilized by the *Conseil d'Etat* in this case.

Deferential behavior by courts based either on institution (SC) or subject-matter (national and international security) in rights-based claims is reflective of a decision to frame a legal dispute as being one of security *v* rights (i.e., as a dichotomous question) rather than one of security *and* rights (i.e., as a harmonization question). This is perhaps best illustrated by the House of Lords' decision in *Al-Jedda* where the majority of the Law Lords seemed to assume that there was a conflict between the obligation to engage in security detention and the right to be free from arbitrary detention under Article 5 ECHR. Only Baroness Hale appeared to seriously question the extent to which the actions complained of were *in fact* required by the relevant Resolutions. While ultimately agreeing with the decision that where conflicting obligations exist they are to be reconciled by means of qualifying the rights protected by the ECHR, she stressed the importance of gauging the extent of an obligation in order to fully assess whether such a conflict arose in any particular circumstance. Such a fact-based consideration of the extent of an obligation in any given set of circumstances necessarily involves a court in considering whether actions complained of were in fact required for security reasons—a non-deferential approach both in terms of institution (executive, military and SC) and subject-matter (national and/or international peace and security). The failure of most of the Law Lords to engage in such analysis uncovers the deferential tenor of the decision in respect of both institution and subject-matter.

4. Primacy of the Local Legal Order

A fourth way of framing conflicts between local human rights standards and Chapter VII obligations would be for the national courts, quite simply, to reject the primacy of such Resolutions. One way in which this can occur is, in dualist jurisdictions, for the court to rule that no measure implementing the relevant international norm exists in domestic law. As we saw in Part III, this would be the case, for instance, with an unimplemented Chapter VII Resolution in France or Germany. Even where an implementing measure exists, however, this approach has on occasion been adopted in some jurisdictions. The reasoning of the German BVerfG in *Görgülü* is one instance, although this reasoning dealt with a different conflict of norms (namely that between the German Grundgesetz and the ECHR). In the BVerfG's perspective, this outcome flowed inevitably from the fact that, as a matter of German constitutional law, international law ranked lower in the hierarchy of norms than the Grundgesetz. The local primacy approach is also visible, for instance, in *Medellin v Texas*,¹⁷⁶ in which the U.S. Supreme Court ruled that ICJ judgments do not constitute binding domestic precedent in the U.S.

Some would argue that the ECJ's *Kadi* decision itself fits into this category. Despite the ECJ's ostensible affirmation of the doctrine of primacy of international law,¹⁷⁷ the court ultimately, it is argued, re-asserts the autonomy of the Community legal order and its own jurisdiction to review, in light of EC rights standards, measures which effectively transpose Chapter VII Resolutions in a wholesale manner.¹⁷⁸ As set out below, we reject this argument, asserting instead that the ECJ's approach is a deliberately more subtle one.

¹⁷⁶ 552 US ____ (2008).

¹⁷⁷ Paras 288-299.

¹⁷⁸ See para 316; the fact that the ECJ does not refer to Art 103 of the UN Charter whatsoever; the ECJ's restrictive approach to Art 307 EC; and the ECJ's reasoning on the relevance of Art 300(7): primacy as a result of that article "would not...extend to [EC] primary law, in particular to the general principles of which fundamental rights form part" (para 308). Contrast, for instance, the CFI in *Kadi*, para 193.

5. Human Rights Equivalence

The final way of framing conflicts between legal orders apparent from our survey is what we will term “human rights equivalence”: that is, a judicial decision not to exercise review of another legal order’s norms for compliance with one’s own rights standards on the basis of a determination that, overall, the other order offers equivalent rights protection. This is the approach famously espoused by the German BVerfG to allow itself to conclude that, so long as the EC legal order offers equivalent - although not necessarily identical - rights protection to that of the German legal order, it will not exercise its power of review over Community norms. A similar approach has been adopted in a variety of other national courts *viz-a-viz* EC law, and is also evident in the ECtHR’s *Bosphorus* judgment. This way of framing a potential conflict of legal orders has, within Europe at least, become a classic judicial means of reaching a compromise between ensuring continued rights protection, on the one hand, and the realities of far-reaching international cooperation, on the other.

In its submissions before the ECJ in *Kadi*, the Commission argued for the adoption of an analogous approach to the review of Chapter VII Resolutions in the EU legal order. This would have meant that the ECJ would “not intervene in any way whatsoever” so long as, in the sanctions procedure at UN level, a system exists whereby “the individuals or entities concerned have an acceptable opportunity to be heard.”¹⁷⁹ The ECJ, however, rejected such an approach as “unjustified”, as the UN’s system “clearly...does not offer the guarantees of judicial protection.”¹⁸⁰ As a result, the ECJ was obliged to review the implementing EC measure for rights compliance.¹⁸¹

Despite this conclusion on the facts, the ECJ’s deliberate consideration of whether the

¹⁷⁹ Para 319.

¹⁸⁰ Para 322.

¹⁸¹ Para 326.

doctrine applied - and its hint that the doctrine might in the future apply¹⁸² - was clearly aimed at sending out a message to the UN: get your rights protection in order, and we will not second-guess you.¹⁸³ We argue below that the ECJ is effectively thereby seeking to incentivize the UN to improve its rights protection regime, and that it is, in this sense, a strategic actor on the international political plane.

B. *Kadi's* Internal Message

Kadi has clear implications for the EU's own legal order. In particular, *Kadi* offers a further example of the ECJ's willingness to assume a role as a political actor in shaping the constitutional balance of power in the EU's internal affairs.¹⁸⁴ *Kadi* fits in a long line of cases in which the ECJ has characterized itself as the ultimate judicial arbiter in an autonomous constitutional legal order created by the EEC Treaty.¹⁸⁵ Although the Community was treaty-based, and thus ostensibly a typical creature of international law, the ECJ lost no time in unilaterally declaring that the EEC Treaty was no "ordinary" international treaty;¹⁸⁶ rather, its member states had "limited their sovereign rights, albeit within limited fields", thus creating a body of law the subjects of which were not only states (as per typical international law), but also their nationals.¹⁸⁷

182 See, for instance, para 326: ECJ was obliged to ensure the review, "*in principle* the full review" (our emphasis) of the lawfulness of EC acts designed to give effect to Chapter VII Resolutions.

183 See also, Opinion of AG Maduro, para 54, who considered that, if sufficient rights protection had existed at UN level, the ECJ would not have had to review the impugned measure. See *contra* this interpretation, however, Daniel Halberstam and Eric Stein, *The United Nations, the European Union and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order* 46 COMMON MARKET LAW REVIEW 13 (2009), who are of the view that the ECJ with *Kadi* has definitively rejected any possible application of a human rights equivalence doctrine in such cases.

184 On the ECJ as a political actor, see, for instance, KAREN ALTER, *THE EUROPEAN COURT'S POLITICAL POWER: SELECTED ESSAYS* (2009).

185 The EEC Treaty is now known as the EC Treaty, following the expansion of the EEC's aims beyond the purely economic achieved, in particular, with the 1992 Maastricht Treaty.

186 Case 6/64 *Costa v ENEL* [1964] ECR 585, 593.

187 Case 26/62 *Van Gend en Loos* [1963] ECR 13. This approach lies at the heart of its famous early judgments in which it laid down what remain the founding pillars of EC constitutional law, namely the revolutionary doctrines of primacy of EC law over national law (Case 6/64 *Costa v ENEL* [1964] ECR 585) and direct effect (Case 26/62 *Van Gend en Loos* [1963] ECR 13) of EC law. See generally, ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* (2004).

Nonetheless, *Kadi* represents a constitutionalism of a radically different nature to that developed by the ECJ in these early cases, which were ultimately premised on the economic aim of achieving a common market.¹⁸⁸ This economic constitutionalism on the ECJ's part was hugely successful, playing a vital role in pushing often unwilling member states and Community institutions towards completion of the common market goal - although with the inevitable accompanying criticism that this smacked of judicial activism.¹⁸⁹ The aims of the EC (and, since its creation in 1993, the EU) have moved on significantly beyond the economic and are now founded on the principles of "liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law."¹⁹⁰ The post-*Kadi* constitutional order, expressly rooted in these principles, represents another step in the ECJ's efforts to construct its vision of a new constitutional order based on rights and social protection. As such, the judgment should be viewed as complementing not only its fundamental rights jurisprudence,¹⁹¹ but also its case law on the rights of EU citizens and broader social rights.¹⁹² In each case, the ECJ seeks to identify and make effective what it sees as the fundamental principles of the new constitutional order, albeit emphasizing the acceptability of a pluralism of social values within such order.¹⁹³ While these judgments are also susceptible to the criticism of judicial activism, they can ultimately

188 See L. Azoulay, *Le rôle constitutionnel de la Cour de justice des Communautés européennes te qu'il se dégage de sa jurisprudence* RTD EUR 44(1), janv-mars 2008, who refers to this concept as *le constitutionalisme de marché*.

189 See, for instance, Joseph Weiler, *A Quiet Revolution: The European Court of Justice and its Interlocutors* 26 COMPARATIVE POLITICAL STUDIES 510 (1994); MIGUEL MADURO, *WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION* (1998); ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* (2004).

190 Article 6(1) EU.

191 See Part II above.

192 See, for instance, Case C-85/96 Martinez Sala [1998] ECR I-2691, Case C-184/99 Gryzelczyk [2001] ECR I-6193, Case C-406/04 De Cuyper [2006] ECR I-6947, Case C-192/05 Tas Hagen [2006] ECR I-451, Case C-144/04 Mangold [2005] ECR I-9981. See further, Norbert Reich, *A European Constitution for Citizens: Reflections on the Rethinking of Union and Community Law* 3 EUROPEAN LAW JOURNAL 131 (1997).

193 See L. Azoulay, *Le rôle constitutionnel de la Cour de justice des Communautés européennes te qu'il se dégage de sa jurisprudence* RTD EUR 44(1), janv-mars 2008, 40 and Miguel Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action* in NEIL WALKER (ED.) *SOVEREIGNTY IN TRANSITION* (2003).

be seen as judicial efforts to promote the democratic legitimacy which the EU still finds so elusive, and which continues to cause it such problems.¹⁹⁴

Moreover, the ECJ's deliberate emphasis on the centrality of fundamental rights to the EU legal order represents a further chapter in the long-running judicial dialogue between the EU and national courts concerning the ECJ's doctrine of primacy of Community law over national law. Although, as noted above, this doctrine was set out on the ECJ's part as early as the 1970s, it has had a long and at times difficult reception by national courts.¹⁹⁵ In many jurisdictions - including Germany and France - this doctrine has been accepted only on the condition of adequate protection of fundamental rights in the EU legal order. In this sense, *Kadi* sends out a further message of reassurance to EU national courts potentially sceptical of the EU's fundamental rights credentials. Indeed, the EU's muscular judicial review in *Kadi* surpasses the standard of review applied to similar measures in the national EU jurisdictions we examined above. From this perspective, therefore, *Kadi* strengthens the doctrine of primacy of EC law over national law. Ironically, however, the ECJ's external message from *Kadi* - its approach to the primacy of international law - has inevitable, and potentially dangerous, repercussions for this very doctrine. One of the jurisdictions with the most difficulties in accepting the doctrine was Germany, and the ultimate equilibrium arrived at by the Federal Constitutional Court - as set out in the *Solange* and *Brunner* judgments - has been hugely influential.¹⁹⁶ The ECJ's refusal in *Kadi* to espouse a *Solange* approach to review of EC measures implementing SC

194 Evidenced, for instance, by the 2005 rejections of the Constitutional Treaty by referenda in France and the Netherlands and the 2008 rejection of the Treaty of Lisbon in Ireland by referendum (though passed in a second referendum of October 2009).

195 See, for instance, (Germany) *Internationale Handelsgesellschaft* [1974] 2 CMLR 540 ("Solange I"), *Re Wünsche Handelsgesellschaft* [1987] 3 CMLR 225 ("Solange II"), *Brunner v The European Union Treaty* [1994] 1 CMLR 57 ("Maastricht"); (Italy) *Frontini v Ministero dell Finanze* [1974] 2 CMLR 372; (Poland) judgment of the Polish Constitutional Tribunal in *Polish Membership of the European Union (Accession Treaty)* K 18/04, May 11, 2005, discussed above.

196 *Solange II* and *Brunner*, *Id.*

Resolutions potentially strengthens the hand of national courts wishing to re-emphasize that the ultimate jurisdiction to decide on whether EC or national norms apply lies with them, and not with the ECJ.¹⁹⁷ Put simply, the foreseeable reaction of such courts to *Kadi* may be: “if the ECJ can adopt this reasoning, why can’t we?” The Federal Constitutional Court’s June 2009 *Lisbon* decision, to which reference has already been made in Part III, offers an excellent early example of this unintended cross-fertilization. In considering the compatibility of the Lisbon Treaty’s Declaration concerning primacy,¹⁹⁸ the court used the opportunity to reaffirm that Germany “does not recognise an absolute primacy of application of Union law”¹⁹⁹ and relied expressly on the ECJ’s reasoning in *Kadi* to justify this position. Just as the ECJ in *Kadi* was justified in choosing, in a “borderline case,” to place “the assertion of its own identity as a legal community above the commitment that it otherwise respects”, so the German courts would be justified in “exceptionally” declaring EU law inapplicable in Germany.²⁰⁰ We anticipate an analogous approach may be adopted by national courts in which primacy of Community law has met with a similarly difficult reception - a recent example being the Polish courts.²⁰¹

A final important aspect of the internal message communicated by *Kadi* lies in the ECJ’s confirmation that the correct legal bases had been used in adopting the contested Regulation. Legal basis disputes have over the years formed the battleground for some of the EU’s most highly charged political power struggles.²⁰²

197 Often described as the *Kompetenz-Kompetenz* question - i.e., the question of which court - EU or national - has ultimate power to decide on the scope of the EU’s competences.

198 Declaration No. 17 to the Treaty of Lisbon OJ 2008 C 115/1.

199 *Kadi*, para 331.

200 *Kadi*, para 340.

201 Judgment of the Polish Constitutional Tribunal in Polish Membership of the European Union (Accession Treaty) K 18/04, May 11, 2005.

202 See, for instance, Case C-300/89 Commission v Council (Titanium Dioxide) [1991] ECR I-2867, Case C-376/98 Germany v Parliament and Council (Tobacco Advertising) [2000] ECR I-8419, Case C-176/03 Commission v Council (Environmental Criminal Penalties) [2005] ECR I-7879.

Kadi is no exception. By reaffirming the use of the combination of Articles 60, 301 and 308 EC for the EU's asset-freezing measures, the ECJ refused to accede to the wishes of the Commission, which was pushing for a move away from unanimity of voting to qualified majority voting in the Council. This is significant, because the ECJ thereby ensured a continuing parallel in the voting rules applicable to the EU measures implementing Chapter VII Resolutions (common positions), where unanimity applies, and the EC measures implementing such Resolutions. In other words, member states retain a veto over EC and EU implementing measures in this most sensitive of areas. The ECJ's conclusion will offer reassurance to nervous member states who are still smarting from the ECJ's recent willingness to impose qualified majority voting in another highly sensitive area, namely criminal justice.²⁰³

C. *Kadi*'s External Message

While some commentators have been critical of the ECJ's approach in *Kadi* arguing that the decision to focus exclusively on European law essentially removed the court from engaging in an important dialogue about the relationship between international and European law,²⁰⁴ we take the view that the court's approach did not in fact indicate a desire to abstain from this debate but rather a different way of engaging in it. Instead of focusing on the meaning of Article 103 of the United Nations Charter—the international law of another international institution which the court neither needed to consider nor, arguably, was competent to engage in²⁰⁵—the ECJ focused on the meaning of its own legal principles, structures and fundamental rights

203 Case C-176/03 *Commission v Council* (Environmental Criminal Penalties) [2005] ECR I-7879, Case C-440/05 *Commission v Council* (Ship Source Pollution) [2007] ECR I-90907.

204 See particularly Gráinne de Búrca, *The EU, the European Court of Justice and the International Legal Order after Kadi* 51(1) *HARVARD INTERNATIONAL LAW JOURNAL* (2010) (forthcoming).

205 See Piet Eeckhout, "Kadi and Al Barakaat: Luxembourg is not Texas—or Washington DC", *EJIL: Talk!*, 25 February 2009, available at <http://www.ejiltalk.org/kadi-and-al-barakaat-luxembourg-is-not-texas-or-washington-dc/> (23 July 2009).

jurisprudence. But it did so in the knowledge that such a focus had the capacity to have an important knock-on effect within other international institutions. Specifically, the ECJ's decision in *Kadi* can, we argue, contribute to the process of international constitutionalism notwithstanding its dualist nature.

Although a number of commentators such as de Búrca,²⁰⁶ Posner and Goldsmith²⁰⁷ have argued (to varying degrees) that the *Kadi* decision is analogous to the approach of the United States in *Medellin v Texas*²⁰⁸ we argue that these views do not take sufficient account of the EU's dual role as an international actor, first in its own right (politically at least, notwithstanding its lack of legal status to become a member state of the UN) and second in the form of its 27 member states all of whom participate in international law-making as part of the international community and all of whom are now fully aware that the international obligations they help to create will have to sit comfortably with their obligations as members of the EU. In addition, the substantive nature of the dispute in both cases is distinguishable—*Medellin* concerned the attempt to bestow positive rights on individuals through a non-incorporated international treaty (the Vienna Convention on Consular Relations (1963)) pursuant to a decision of an international court (the International Court of Justice²⁰⁹) whereas *Kadi* concerned a challenge to the violations of rights already bestowed within the EU by means of executive action within that same legal system.²¹⁰ Unlike *Medellin* then, *Kadi* does not represent an isolationist or sovereigntist approach to international law. Rather we submit that *Kadi* represents the reassertion of a values-based commitment to

206 Above n. 204.

207 Eric Posner & Jack Goldsmith, "Does Europe Believe in International Law?" *Wall Street Journal*, 25 November 2008.

208 552 US ____ (2008). For an excellent overview see Margaret McGuinness, *Medellin v Texas* 102 AMERICAN JOURNAL OF INTERNATIONAL LAW 662 (2008).

209 *Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgment) [2004] ICJ Rep 12.

210 As Eeckhout (above n. 205) has noted, *Kadi* is therefore more in the mould of the 'classic' constitutional judicial review case than was *Medellin*.

individual rights within the European legal system that is shared by general international law but which had not been honored in the asset-freezing regime in operation since the attacks of September 11, 2001.

This conclusion can be reached notwithstanding the fact that the court did not engage with the terms of Article 103.²¹¹ This was a matter of framing on the part of the ECJ: it chose to frame the question exclusively as one of European law. The possible reasons for this are manifold—it could be that the court felt that an exclusively European law focus was all that was necessary to resolve the legal questions raised in the case and that there was no need to consider general international law; it could also be that the court did not want to engage in a direct review of the relevant SC Resolutions because that would have required consideration of whether the SC had acted *ultra vires* and thus a substantive judicial review of the extent of the SC's powers (and not merely of whether the Resolution complied with European fundamental rights standards); or it could be that the court felt it could do justice in the case *and* communicate both its internal and external messages effectively while staying within the local legal system where its jurisdiction, expertise and capacity to compel compliance were undisputed. The last option seems, to us, the most probable.

The internal message, as discussed above, is one of European constitutional significance that has a pedigree in the court's own jurisprudence. The external message, however, can be read either (as some commentators have done) as one of the superiority of the local legal system (i.e. European law)²¹² or, as we do, as one of the

211 In fact, of the cases considered above Article 103 was materially considered in only one: *Al-Jedda*. Otherwise the meaning, effect and implications for human rights law of Article 103 have been largely avoided by the deciding courts. In this, the ECJ is not alone. The difference, however, is that the ECJ reached a rights-protecting conclusion that it indicated could co-exist with general international law notwithstanding its avoidance of Article 103.

212 Above n. 204.

superiority of shared values of fundamental rights. *Kadi* in our view is not a case that ought to be read as holding that there is something uniquely important about European law, but rather as a decision that communicates the message that there is something uniquely important about individual rights protection. It stresses the need to ensure that all measures taken by states acting together, even in the important area of national and international peace and security, must be designed in a manner that recognizes the importance of individual rights protection and of an institutional commitment to fundamental rights that can not be swept aside for the purposes of expediency. Although the court claims to be concerned only with European law and with a review of the implementing measures within European law itself, its broader external message is clearly extractable: if the SC is to introduce measures of this kind under Chapter VII Resolutions then those measures as implemented within the EU must reach certain minimum standards of rights protection. Thus, what some have termed the ECJ's fragmentation of international law²¹³ and others have deemed a commitment to pluralism in international law²¹⁴ is to us rather an assertion of the commonalities in values between two international institutions upon which an inter-institutional (ECJ and SC) and inter-organizational (EU and UN) dialogue can be based. It is, in other words, a constitutionalist case.

The constitutional commitment to rights protection that underpins the EU is analogous to the constitutional commitment to human rights that underpins the UN. In both organizations the protection and promotion of fundamental rights is expressly constitutionalized. Thus, Article 6(1) EU provides that the union is founded on the

213 Katja Ziegler, *Strengthening the Rule of Law but Fragmenting International Law: The Kadi Decision of the ECJ From the Perspective of Human Rights* 9 HUMAN RIGHTS LAW REVIEW 288 (2009).

214 Above n. 204. Pluralism in international law promotes the recognition that there are various diverse normative systems that can co-exist. This is in contrast to dualism, which recognizes that there are different legal systems governing internal and external spheres but that the internal legal system has primacy within domestic law and courts over the external system.

principles of “liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the member states” and Article 1(3) of the UN Charter provides that achieving international cooperation in the promotion and protection of human rights and fundamental freedoms is one of the Purposes and Principles of the United Nations.²¹⁵ It is at least arguable that the SC is subject to a legally binding obligation to respect human rights in the course of its operations, including in shaping Chapter VII Resolutions.²¹⁶ Not only is rights protection a fundamental mission of both of these organizations, but in both the EU and the UN this protective commitment seems constitutionally designed to limit the actions of the various institutions within those organizations. The ECJ, therefore, in *Kadi* and (as discussed above) in its previous jurisprudence had asserted the right to strike measures down for non-compliance with fundamental rights protections. Analogously, Article 24(2) of the UN Charter provides that “the SC shall act in accordance with the Principles and Purposes of the United Nations” in discharging its duties. As illustrated above, rights-protection is one of those principles and purposes and there seems to be nothing in Article 24(2) to suggest a hierarchy between rights and security in terms of the SC’s obligation to act in a manner consistent with the organization’s principles and purposes. In fact, in 2005 the then Secretary General Kofi Annan expressly constructed both of these purposes and principles as being co-existent and co-dependent within the UN order.²¹⁷ Not only is there is a commonality in the constitutional positioning of rights-protection between the UN and the EU but the civil and political rights in question in *Kadi*, although framed as ‘European’ fundamental rights, are in no way unique to the European legal order. As considered

215 See also Article 55, Charter of the United Nations.

216 ERICA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL (2004), 191-200.

217 KOFI ANNAN, IN LARGER FREEDOM: TOWARDS SECURITY, DEVELOPMENT AND HUMAN RIGHTS FOR ALL (2005).

in Part II above, the right to due process is also protected in international human rights law. It was represented as a European right in *Kadi* because the legal dispute in question was considered within a framework of European law, but this does not mean that their relevance and content of European rights are different from those rights within the international sphere.

Thus, by framing and considering the questions in *Kadi* as questions of European law, governed by the EU's autonomous legal system, the ECJ was simultaneously restricting itself to its own area of legal competence and expertise (or, acting in a dualist manner) *and* propounding values, standards and a commitment to judicial review of rights violations as a fundamental element of the rule of law that are part of the constitutional values underpinning *both* the European and the international legal order. The court could, therefore, avoid allegations of subjecting the SC itself to judicial review, thereby acting outside of its institutional and organizational competencies, while at the same time progressing and engaging in the project of international constitutionalism in a manner that stresses the nature of rights and security as coexistent, co-dependent, and coequal values within international law. We are conscious of Joseph Weiler's editorial comment that "'reading into the decision' [in *Kadi*] a dialogical element reminiscent of the *Solange* jurisprudence" is an example of "beauty that comes from the eye of the beholder, not from the text of the Decision."²¹⁸ Still, we are of the view that seen in its context and particularly by reference to the conscious framing decisions of the court, such an external message seems both actuated and intended.

V. Conclusion: The Impact of *Kadi* in Real Terms

²¹⁸ Joseph Weiler, *Editorial* 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW 895 (2008), 896.

Seen in its context, *Kadi* contains important internal and external constitutional messages about the role of fundamental rights in times of perceived instability in international peace and security and about the need for the international legal system to be cognizant of the other layers of obligations that states must comply with. While, under international law, these obligations may be inferior to those flowing from Chapter VII Resolutions (and the ECJ made no finding as to the hierarchy of norms in general international law whatsoever), the effect of *Kadi* is that, when acting within the EU, states' local fundamental rights obligations under EU law are supreme. As noted in Part IV above, the court's method of framing the questions raised in *Kadi* allowed it to negotiate a path towards communicating both these external and internal messages without it being subjected to the criticism of jurisdictional expansionism. Nonetheless, the extent to which the court has in fact managed to effect real change in both its external and its internal spheres of influence by means of *Kadi* does not present altogether as bright a picture as might have been hoped.

At the EU level, as noted above, *Kadi* had the immediate practical effect that the applicants were informed of the reasons for their listing and had the opportunity to make comments on these reasons, but were ultimately maintained on the blacklist. As this merely dealt with the ECJ's concerns in the individual case at hand, in April 2009, the Commission put forward a legislative proposal to extend these rights generally to all individuals and entities newly listed by the UN and falling within the scope of the EU's implementing legislation.²¹⁹ In particular, the effect of the proposal would be to bring the listing procedure in such cases in line with the procedure followed in drawing up the EU's own blacklists,²²⁰ ensuring that listed persons or

219 Proposal for a Council Regulation amending Regulation 881/2002, COM (2009) 187 final. The scope of the Regulation is set out in Art. 11, and includes all member state nationals, and legal persons incorporated or constituted under the law of a member state and in respect of any business done in whole or in part within the Community.

220 Regulation 2580/2001 OJ 2001 L 344/70.

entities would be told of the reasons for listing “without delay” and allowing the listed person or entity to submit comments on such listing.²²¹ A special regime, however, would apply to “classified information” submitted to the Commission by the UN or a state, requiring the consent of the originator of the information prior to its release.²²² Nonetheless, there remain serious questions whether this post-*Kadi* procedure truly ensures effective protection of the right of defence, and in particular whether the nature of the information communicated to listed persons enables them effectively to exercise their right to be heard. Particular problems may well arise with regard to the effectiveness of judicial protection where listing decisions are based on classified information, given the CFI’s holding in *PMOI* that a failure to communicate such information - even to the court alone - made judicial review of the listing decision impossible.²²³ Such questions have led Mr Kadi and Al-Bakaraat to challenge the EU’s response to the ECJ’s judgment, which challenge is currently pending before the CFI and may well ultimately fall once again to the ECJ, on appeal, to determine.²²⁴

At the international level, the Sanctions Committee under Resolution 1267 appears to take the view that Resolutions introduced prior to *Kadi* being handed down, but after the point at which Kadi had been included on the Consolidated List, bring the Committee and the Council much closer to a situation of due regard for individual rights. In particular, the Committee’s then-Chairperson, Jan Grauls, expressed the view before the SC in December 2008 that Resolution 1822 (2008) “represent[ed] a

221 Proposal, Art. 7a. The comitology procedure (whereby the Commission, in its decision-making process, is assisted by a committee) is to apply to the decision taken (Art. 7b).

222 Proposal, Art. 7d. The proposal also includes provisions governing the processing of data, including data concerning offences and security measures, relating to listed individuals: Proposal, Art. 7e.

223 Case T-228/02 *PMOI* [2006] ECR II-4665, para 155 and Case T-284/08 *PMOI* [2008] ECR II-0000, para 76. See similarly, Joined cases T-246/08, T-332/08 *Melli Bank v Council*, para 46.

224 Case T-85/09 *Kadi* and T-45/09 *Al-Bakaraat*. In the meantime, the *Kadi* principles have been applied, for instance, by the CFI in Case T-318/01 *Othman* [2009] ECR II-0000 and will be revisited in the appeals in C-403/06 P *Ayadi* and Case C-399/06 P *Hassan*.

milestone in the life of the [Sanctions] Committee” in terms of rights protection. While Resolution 1822 provides for narrative reasons for listing decisions to be provided, it does not appear to actually resolve the rights-protection deficits that arise within the processes of the Sanctions Committee. Grauls also pointed towards the Focal Point process, by which a listed entity can directly apply for delisting, but this process remains deeply political with consulted states having the capacity to ensure that the delisting request itself never reaches the Committee’s meeting agenda. Grauls’ emphasis on Resolution 1822 and on the existence of the Focal Point process rightly identifies that these mark rights-based progression from the Committee’s starting point, but they do not constitute an adequate level of rights protection and do not appear likely to meet the fundamental rights standards of the EU. Importantly, Grauls made it clear that he and the Committee were aware of the external pressure to improve the sanctions process from a human rights perspective.²²⁵

Thus, while the SC may not have gone as far as the ECJ prescribed in *Kadi*, that decision has placed “[d]ue respect for fair and clear procedures”²²⁶ firmly on the Sanctions Committee’s agenda.²²⁷ That this has not resulted in an immediate *volte face* and an exercise of rights-proofing the sanctions regime does not mean that the ECJ has either failed to identify itself as an international interlocutor in the dialogue about the relationship between security and rights nor that, even if it has so identified itself, it has failed to bring about effective change. A pattern of dialogue between courts and other governmental institutions as regards trying to ensure proportionality and rights-protection in counter-terrorist measures has emerged in domestic

²²⁵ Meeting of the SC, 15 December 2008, UN Doc S/PV.6043.

²²⁶ *Id.*

²²⁷ See, the most recent report of the Analytical Support and Sanctions Monitoring Team established pursuant to SC Resolution 1526 (2004) and extended by Resolution 1822 (2008), May 11, 2009, available at <http://www.un.org/sc/committees/1267/monitoringteam.shtml>, which describes *Kadi* as “arguably the most significant legal development to affect the [Al-Qaeda and Taliban sanctions] regime since its inception” (at 10).

jurisdictions such as the U.S. and the UK whereby, over a number of cases, measures have slowly been made more rights-compliant and taking human rights concerns seriously has been built in to the processes of both making and applying law.²²⁸ Although the ECJ, the SC and the Sanctions Committee do not have the same kind of relationship as, for example, a domestic Supreme Court, Executive, Parliament and law enforcement agency (nor do we mean here to suggest that they do), the nature of the inter-institutional and inter-organizational dialogue may progress along analogous lines. The potential of such dialogue, and the importance of independent judicial review in this regard, was expressly recognized post-*Kadi* by the SC's Monitoring Team for the Al-Qaida and Taliban sanctions regime.²²⁹ Yet, this was done with a warning note - a further element in the dialogue - that the Sanctions Committee may only value the view of a national or regional court that has carefully evaluated reasons for listing as stated by the Committee and has accorded appropriate deference to its fact-finding and decision-making prerogatives.²³⁰

The Monitoring Team's May 2009 Report provides further indication that, as we have suggested above, the question of the extent to which courts are entitled to examine the - often classified - evidence behind listing decisions may form the next litigation battleground in this area.²³¹ The reaction of the CFI - and ultimately, potentially, the

228 This jurisprudence is documented by de Londras in Fiona de Londras & Fergal F. Davis, *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms* (2010) OXFORD JOURNAL OF LEGAL STUDIES ____ (forthcoming), Part III.

229 Report of the SC's Analytical Support and Monitoring Team for the Al-Qaeda and Taliban sanctions regime, May 2009, note _ above, para 28, "If national and regional courts provide a forum for listed persons to bring additional information to the fore and to express their grievances, they may allow a better evaluation of the strengths or weaknesses of the cases against them, especially when the challenge is brought in the courts of the designating States, which will likely have the most information against them." On the potential of judicial - rather than diplomatic - review to apply pressure to improve listing procedures, see Monika Heupel, *Multilateral sanctions against terror suspects and due process standards*, 85(2) INTERNATIONAL AFFAIRS 307 (2009).

230 *Id.*, para 29.

231 *Id.*, para 22: "if the Court decides to examine the evidence behind the reasons for listing provided by the Committee, or if it decides it must conduct a complete review of the listing decisions, it will give rise to new and more difficult issues. The narrative summaries indicate the existence of evidence known to Committee members, not all of which is publicly available. There are limits to the ability of the Committee to reveal the reasons behind its decisions, even to a reviewing

ECJ - to the follow-up challenge from Mr. Kadi may well provide the key to understanding the extent to which *Kadi* truly represents the ECJ's willingness to engage in such dialogue or, in the alternative, whether *Kadi* really ought to be seen as a dualist, sovereigntist and isolationist judgment for which the local legal system was the sole intended theatre.

body, when these are based on intelligence or law enforcement information which belongs to a particular State.”